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RENT CONTROL IN INDIA

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1. INTRODUCTION

1.1. The basic objective of the rent control legislation is to ensure reasonable rents and security of tenure for tenants. Its primary justification is the need to conciliate the interests of tenants and landlords in a situation of extreme scarcity of housing units compared to the demand for them. As a control of price on an item of basic needs, it is also considered as a welfare measure to help the disadvantaged group of society to consume adequate amount of housing services. Rent control, like any other price control, is also justified as an anti-inflationary measure.

1.2. As in the rest of the world, the rent control legislation in India owes its origin to the two world wars. The first rent control Act in the country — the Bombay Rent (War Restriction) Act — was enacted on April 10, 1918. This was followed by the Calcutta Rent Control Act, 1920. The Rent Acts of Bombay and Calcutta were amended several times, even during initial years. Some early examples of these legislations are the Bombay Rent Restriction Act, 1939; Bombay Rents and Hotel Rates and Lodging House Rates (Control) Act 1944; Bengal House Rent Control Order, 1942; Calcutta Rent Ordinance, 1946; etc. Rent Control in India assumed some measure of permanence with the introduction of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

1.3. Designed to protect urban tenants from escalating rents and hotel rates, the rent control enactments showed varying geographical coverage, and each succeeding legislation was a refinement over the previous one. As housing has been treated as state subject in the Indian Constitution, different state governments framed their own Rent Control Laws — all of them broadly similar in their general thrust and tenor, except for some minor and specific variations. The legislations were enacted in urban areas of almost all the states in the country by 1972 (Table 1).

1.4. The Rent Control Acts, usually, apply to all residential and non-residential premises in urban areas except those belonging to the Union Government, State Government and local authorities. The Acts typically contain the following provisions:

(a) control on letting and leasing of vacant buildings to assist tenants in their search for desirable rented accommodation,

(b) fixation of 'fair' or 'standard' rent,

(c) protection to tenants against indiscriminate eviction by unscrupulous landlords,

(d) obligations and duties of landlords vis-a-vis maintenance and upkeep of their rented properties,

(e) rights to landlords against tenants who default in paying rent or misuse the premises, and

(f) rights to landlords for the recovery of premises in specific cases.

1.5. Rent control legislations in some of the States in the country have provisions for a rent control holiday (exemption from main provisions of the Act) for a limited number of initial years, varying from 4 years to 20 years, for all new buildings (constructed after a specified date). In the Andhra Pradesh Act, all buildings constructed on or after August 26, 1957 were exempted from all the provisions of the Act until 1983, when the Supreme Court declared this provision as violative of Article 14 of the Constitution of India. With effect from 26th October 1983, the Andhra Pradesh Act provides exemption from the operation of the provisions of the Act, (i) to all buildings for a period of ten years from the date on which their construction is completed and (ii) to such buildings the monthly rent of which exceeds rupees one thousand for an indefinite period. In Jammu & Kashmir, rented premises occupied by tenants with a yearly net income of more than Rs. 20,000 do not come under the purview of the Rent Control Act. In Tamil Nadu, premises of monthly rent of more than Rs. 400 were exempted from the provisions of the Act until recently. Some Acts (in about 10 States/Union Territories) also require reporting of vacancy of premises by the landlords to enable the State to allot such vacant buildings (Table 2).

1.6. Fixation of "fair" or "standard" rent is taken up by the competent authority (Rent Controller/Civil Court) on application by the landlord or the tenant. The fair rent, usually, fixed in relation to the cost of construction of the premises and market price of land at the time of commencement/completion of construction of the building (ensuring an annual rate of return varying from 6 to 12 per cent of the cost), remains frozen at the original level. In Tamil Nadu, the Rent Act was amended in

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1973 to provide for determination of fair rent on the basis of cost of construction plus market value of the site as at the time of application for fair rent fixation.

1.7. In some of the Acts, taxes on the property and cost of repair and maintenance are also taken into account while determining fair rent. In the Rent Acts of Rajasthan, Haryana and Madhya Pradesh, the rent first agreed upon between the landlord and the tenant becomes the fair rent. The Acts in some States have incorporated provisions to increase fair rents periodically, from the frozen base/year level, e.g., in Assam, West Bengal and Haryana.

1.8. Some Acts, e.g., in the States of Karnataka, Madhya Pradesh and Tamil Nadu, prescribe a priority list for allotment of rent controlled unit favouring members of the State Legislature, Members of Parliament, employees of State and Central Government, etc. (Table 3). Based on data obtained from Rent Controller's Office in Bangalore city, it is estimated that about two-thirds of the total allotment in the recent years have gone to Government Servants.

2. IMPLEMENTATION OF RENT CONTROL ACTS

2.1. The responsibility of implementing and enforcing the various provisions of rent control legislation is vested in the competent authority designated as Rent Controller, the Civil Court, and the prescribed authority. There are variations in the division of responsibility among the Rent Controller, the Civil Court and the prescribed authority in different State Acts. For example, in the Karnataka Rent Control Act, lease of building, fixation of fair rent, increasing the rent, eviction, giving possession as also conversion of residential buildings to non-residential buildings are the functions entrusted to the Rent Controllers who are the executive officers of State Government and enjoy quasi-judicial powers. Adjudication of disputes between tenants and landlords relating to payment of rents, recovery of possession, and provisions of services are within the jurisdiction of Civil Courts. In the Bombay Rents, Hotel and Lodging House Rates Control Act, the Civil Court is responsible for fixing the fair rent.

2.2. Generally, the enforcement of the various provisions of Rent Control Act is not very effective except where historically frozen rents have prevailed in a large scale. This is mainly on account of:

(a) ability of landlords and tenants to circumvent the provisions of the Act,

(b) complications in the fixation of standard rents,

(c) problems associated with recovery of possession and eviction, and

(d) inadequate and ill-trained enforcement staff.

2.3. Rent Control Acts in many States stipulate that every landlord should, within a specified period (7 to 15 days) after the building coming under the purview of the Act, becomes vacant by his ceasing to occupy it, by the termination of a tenancy, or by eviction of the tenant or by the release of the building from acquisition, or otherwise, inform the Rent Control Administration about the vacancy. In practice, landlords seldom give such intimation to the administration, unless they feel compelled to do so due to various reasons. Rent Controller's vigilance staff, responsible for keeping track of the vacancies are, quite often, under pressure to ignore house-vacation they come across. The pressure may be exerted through monetary incentives from landlords and unauthorised tenants, or through political or bureaucratic influence. Even when the house-vacancy has been reported, the Rent Controller has initiated the proceedings for its allotment, the landlords often manage to gain their own ends. Where a landlord has failed to save his unit from the ambit of Rent Controller, he appeals against the allotment to the District Court, provided he is prepared to go through the exacting process involved. The Rent Controller's decision on allotment may be and is, in many cases, revoked. Here, the main considerations are, choice of tenant, fixation of fair rent, requirement of landlord for self-occupation, etc.

2.4. The proportion of houses, finally allotted to tenants through the Rent Controller, to the total housing stock turns out to be a small fraction. Based on enquiries made from Rent Controller in Bangalore City and other knowledgeable officials of the Karnataka state government, in the year 1984, the proportion of houses allotted through the rent controller was estimated at about 2 per cent or even less. According to a sample survey conducted in 1974, 62.8 per cent of the total households in the city lived in rented dwellings (Prakasa Rao and Tewari, 1979). This percentage was estimated as at least 65 per cent in 1986. Out of this, the houses that did not come under the purview of the Act for allotment through the Controller, were about 45 per cent; about 15 per cent being less than 5 years old; about 10 per cent because of monthly rent of less than Rs. 15; and about 20 per cent because of the reason that the present tenant occupied the house at the time when it was less than 5 years old. Thus it is estimated that while, according to the provisions of the Act, about 20 per cent of houses should get allotted through the Rent Controller, in practice, it takes place in only about 2 per cent of the cases.

2.5. One of the main provisions of all Rent Control Acts is determination of 'fair' or 'standard' rent. The purpose of this provision is to ensure that the tenant is not charged with exorbitant rent by the landlord and, at the

same time, to provide for a fair rate of return on the landlord's investment in the construction of the house. While some rent Acts use the word fair rent (e.g. Andhra Pradesh, Kerala, Tamil Nadu, Bihar, Haryana, Orissa, Tripura, West Bengal, Jammu & Kashmir, Karnataka, Goa and Pondicherry) the other Acts employ the word standard rent (Bombay, Delhi, Madhya Pradesh, Uttar Pradesh and Rajasthan). The Act of Assam uses both the expressions fair rent and standard rent and prescribes that no landlord shall be entitled to charge fair rent at a figure higher than the standard rent.

2.6. The mode and basis of determination of fair rent are not same in all the Acts. While some Acts prescribe a certain percentage of cost of construction as the basis for fixation of fair rent, other Acts provide for consideration of prevailing rents of similar accommodation during the year of enactment of the Act or during any other base year. Some prescribe both these methods as alternative basis for fixation of fair rent depending upon the year of construction of the house (Table 4).

2.7. For example, in Bangalore City, on receipt of request for fixation of fair rent from the landlord or the tenant, the Controller holds an inquiry as he thinks fit, to fix the fair rent for the building. The factors to be taken into account in determining fair rent are, the prevailing rates of rent in the locality for similar accommodation and circumstances, rental value as entered in the property tax assessment book of the Bangalore City Corporation, and the circumstances peculiar to the case, including any amounts paid by tenant in addition to rent. For buildings constructed before April 1, 1947 the fair rent was sought to be fixed at rates prevailing during the twelve months prior to April 1, 1947. In the case of later constructions, if the rental value does not exist in the municipal records, the fair rent may be calculated on the basis of 6 per cent per annum of the aggregate amount of cost of construction and the market value of the land component on the date of commencement of construction. In the case of buildings constructed after August 1, 1957, the provisions of fixation of fair rent do not apply for a period of first five years. The provisions are applicable in all other cases irrespective of whether the buildings are allotted by the Rent Controller or not. In practice, where after the stipulated holiday of 5 years, a rental unit comes up for fair rent fixation, in general, rent received when first let out is taken as the fair rent. This provision of the law encourages the landlords to demand as much rent as possible during the rent control holiday period of first five years of construction.

2.8. Fair rent remains fixed till such time as the landlord files a new petition with the Rent Controller of enhancement of rent, and goes through the process of hearing. Under the Karnataka Rent Control Rules, the Controller enjoys a lot of discretionary power in regard to fixation of fair rent.

2.9. Although detailed procedures are prescribed in the legislation for the fixation of fair rent, in practice it is a difficult task because of the lack of documentary evidence in respect of the required information base such as, cost of construction at the time of commence/completion of the construction, market value of the land at the time. The determination of the costs is a complex process and often becomes a matter of dispute between the landlord and the Rent Controller. Much of the time, the information as supplied by the landlord provides the only basis for determining fair rent. In cases where the factors taken into account in determining fair rent are, the prevailing rates of rent in the locality for similar accommodation and circumstances, rental value as entered in the property tax assessment book of the municipal body, etc. the required information is difficult to collect.

2.10. Rent Acts in most of the States have provision for increase in fair rent in cases where some additions, improvements, or structural alternations in the unit have been carried out at landlord's expense or where the rate of tax or cess payable by landlord is enhanced. However, only rarely such cases appear before the Rent Controller/Court, as landlords who have no incentives even to carry out minimum necessary repairs, seldom think of making any improvement in the structure, and property tax rate increases are unusual. There is no provision under the Act to allow an increase in fair rent on the plea of increase in cost of living.

2.11 Among the grounds on which a landlord can file a suit for recovery of possession, the most common ones are, default in payment of rent, unlawful subletting, and request for self-occupation. But the time consuming and protracted litigation procedure could and do put the landlord to severe hardships, sometimes for years on end, before he is able to recover the possession. Therefore, very often landlords who want the tenants to vacate their premises look upon the practice of harassment of the tenants as a short-cut to recovery of possession instead of the Courts. The most common method of harassment of tenants is to cut off or withhold essential supply and services such as, water supply and electricity. In cases of eviction on the ground of default in rent payment the tenants are usually, let off on payment of rent as per Court Order. The Act stipulates that all landlords issue receipts for rent received from tenants. But, this is very rarely observed and landlords often use the situation to their advantages in court cases on default of payment.

2.12. Sub-letting of rented premises, in part or the whole, is not allowed under the Act in many States. But this is very common practice among tenants holding lease for a long time. Such tenants, while moving their residences to other areas, instead of vacating the premises, sub-let the same at a rent much higher than what they pay to the landlord. The wide prevalence of sub-letting is a reflection of the Court's delay in deciding landlord's suits on the ground of unauthorised sub-letting.

2.13. It is often believed that the powers vested with the judiciary could lead to effective administration of justice. But the elaborate and highly time consuming procedure of Courts lead to heavy backlogs in disposal of cases, and consequent postponement of relief even where such relief is considered urgent. In Bangalore, as on April 1, 1981, about 9,000 court cases under the Act were pending in Small Causes Court, Bangalore. As a result of this situation, both the landlords and the tenants try to avoid getting into the legal tangles on issues arising out of their differences, mainly to avoid the inordinate delays and problems associated with the litigation procedures.

2.14. As regards Rent Control administration, the Rent Controller is seen as a comparative junior officer in the State administrative set up. Further, supporting staff provided to the Controller is very inadequate and illtrained. For example, in Bangalore the two Rent Controllers (one for City Area and the other for Cantonment Area) have a supporting staff of five Revenue Inspectors each.

3. EFFECTS OF RENT CONTROL

3.1. Rent control was introduced in India about 45 years ago; yet, very little empirical research has been done to examine the economic effects of the Act on the housing market in the country. A survey of the limited literature reveals a lack of analytical in-depth studies on the subject. The literature may be broadly classified into two kinds — those which are mostly critical evaluations of the various rent control provisions (Dutta 1972, Khatkhate 1975, Tewari & Kumar 1987) and a relative minority which deal with empirical examination of the several hypothesised effects of rent control (NBO 1965, 1966).

3.2. A near-unanimous opinion expressed in studies on the effects of rent control on housing market, conducted in India and other parts of the world, is that the good effects of rent control in terms of the social roles or objectives originally envisaged, are far from realization. On the other hand, a number of adverse economic effects of rent control intervention are found to be present in varying degrees, in almost all rent controlled markets. The most common ill-effects are:

(i) reduced investment in rental building as periodic return on investment is much below the expected reasonable return level;

(ii) accelerated deterioration in the controlled housing stock as landlords have no incentive to spend money on the upkeep of their units;

(iii) decrease in municipal and other revenues as rateable values or properties are related to standard rent;

(iv) withdrawal of vacant premises from the rental market by the landlords due to the fear of losing the property;

(v) distortions of price signals on scarce resources — urban land and property — leading to inefficient and sub-optimal land use;

(vi) reduction in mobility of households and labour;

(vii) reduction in liquidity of housing assets in the market due to excessive tenant protection from eviction; and

(viii) activation of the parallel economy through 'key money', etc.

3.3. *Reduced Investment in Rental Housing.*— It can be argued that, all other conditions remaining the same, rent control reduces the attractiveness of rental housing investment vis-a-vis other elements of an investment portfolio. Although the supply of rental housing units is affected by many factors, the fact that rent control brings down the periodic return on investment to a level much below the expected reasonable return level inhibits investment in housing. It may be argued that while considering return on investment in real estate, one should also include capital appreciation. But, capital appreciation in the case of urban properties arises mainly in respect of land. House construction for rental market *per se* is influenced by periodic return on the investment in the form of monthly rent.

It is well recognised that rent control legislation has been responsible to a significant extent for the serious shortage of rental housing which prevails in urban areas in the country. Many States have, therefore, amended their Act to provide certain type of exemption to new rental housing.

3.4. *Accelerated deterioration in the controlled housing stock.*—Under rent control the landlord's return on his unit is usually independent of "operating investment", i.e., expenditure with respect to repairs and maintenance. He has, therefore, no incentive to spend money

on the upkeep of the unit. A part of such expenditure, which may be absolutely necessary, is then probably shifted to the tenant, thereby reducing tenants benefit from rent control. Lower maintenance can directly shorten the optimal life of a structure, and thus, accelerated deterioration in housing stock becomes inevitable. In Bombay, even such amendments in Rent Control Act which allow landlords to increase the standard rent upto twentyfive per cent, till expenditure incurred by them on repairs of their premises along with a simple interest of six per cent per annum is recovered, have not been conducive to the landlords to attend to repairs. It has been estimated that in Bombay City as many as 16,000 pre-1940 buildings are in serious state of despair.

3.5. *Decrease in municipal and other revenues.*—So long as property tax levied by municipal bodies and wealth tax levied by the Central Government on housing properties are based on frozen, historical, rent levels, or as is more often the case, linked to the 'fair' or 'standard' rent as defined in Rent Control Acts, the municipal and other revenues fall short of the full potential of revenues that could arise from a taxation system linked dynamically to property values. Judicial pronouncements made by the Supreme Court in the case of *Dewan Daulat Rai Kapoor Vs. New Delhi Municipal Committee and another* and in other similar cases are based on the interpretation that rateable values of the premises, whether residential or non-residential, cannot exceed the standard rent as defined in the Rent Control Act. On the other hand, it may in a given case be less than the standard rent. The implications of these pronouncements on municipal finances are quite serious in view of the fact that property tax constitutes a large proportion of total tax revenue of municipal corporations and other local bodies. According to the report of the Karnataka Taxation Committee, the revenue from property tax constitutes about 52% of the total tax revenue in the Municipal Corporations and about 43% in the case of other urban local bodies. In Bombay, where the base of local taxes for pre-1947 buildings has been frozen at 1940 level, and related to standard rent thereafter, the loss in municipal revenues is estimated to be at least fifty crores per annum. According to another study, for Ahmedabad City a 100 per cent improvement in municipal revenues was deemed possible if property assessment was not tied to the standard rent provisions of the Rent Act.

3.6. *Withdrawal of vacant premises from the rental market.*—The excessive protection given to tenant under Rent Control Act instills fear of losing the property among the landlords and, hence, they tend to withdraw vacant premises from the rental market. The alternatives open to the landlords are to (a) consume more housing services than what they would have consumed without the control, (b) hold back the the units for speculative purposes, (c) sell the units and make capital gains for investment in alternative assets. The capital gains arise mainly due to the potential alternative commercial use to which such properties can be diverted.

3.7. *Distortions in land-use patterns leading to inefficient and sub-optimal landuse.*—Rent control also distorts landuse patterns as the scarce urban land occupied by controlled housing is not allowed to respond to market price-signals. This prevents the activities which can most successfully exploit the locational attributes of a given site from gaining the site through competitive bidding in the real estate market. As a consequence, dilapidated low-rent residential or commercial premises continue to stand in prime locations where high-rise apartment buildings or office-cum-shopping complexes might otherwise be built. The resulting landuse pattern thus becomes increasingly inefficient and sub-optimal.

3.8. *Reduction in mobility of households and labour.*—Rent control could distort locational preferences of tenants by creating incentives for people to continue staying where they are. Such incentives arise due to the benefits derived from having procured a controlled unit on reduced and frozen rents. The reduction in mobility of families that continue to live in controlled premises long after children have grown up and left results in sub-optimal use of living space. The reduction in mobility of labour may have implications on regional development and relocation plans.

3.9. *Limiting liquidity of real estate assets in the market.*—Rent control limits the liquidity of real estate assets in the market since it becomes very difficult to find buyers for premises that are occupied by tenants excessively protected by the Act. This gives rise to an additional risk factor involved in investment in housing and reduces opportunities of making capital gains from the investment. Thus, the investment becomes further unattractive.

3.10. *Activition of the parallel economy.*—Perhaps one of the most undersirable effects of the Rent Control is that it has given rise to a number of ways of illegal transactions between landlords and tenants and also between landlords or tenants and the rent control administration. Considering the magnitude of differences in returns between market rent and controlled rent, the incentive for landlords to surreptitiously evade rent control provisions is strong. In doing so, they are willing to terminate their dealings with the rent control administration to the extent of some portion of capitalised value of such difference in returns. On the other hand, tenants of such partially controlled units are likely to treat

their rent as payment for some of the attributes of their dwellings, and part with some informal considerations such as, lumpsum payments, expenses on maintenance and repairs, so as to enjoy the other benefits. The landlord and the tenant, both wishing to avoid the law, strike deals secretly and with a heightened sense of mutual trust, because of their respective fears of the law. The overall effect of such uneasy contracts would be to keep the effective rent at a level in between the controlled rent and the market rent. Some of the ways through which the rent control provisions are circumvented, are described below.

(a) In metropolitan cities like Bombay, tenancies are transferred for a large capital consideration paid in black money. This key money (popularly known as pugree) represents a part of the discounted present value of the difference between economic rent and the standard rent, and is shared between the outgoing tenant and the landlord. The outgoing tenant is usually the principal beneficiary in such deals, with the landlord getting a smaller share.

(b) In some cities, landlords collect a large sum (about 10 months' rent) as security deposit from tenants. The amount is taken in the form of black money as under the Rent Act only a sum equal to one month's rent is allowed to be taken as deposit.

(c) Many landlords compel their tenants to pay a part of the rent in cash without any receipt. This helps them in keeping the apparent rent to standard rent and also in saving in property tax.

(d) Landlords often abstain from reporting a vacancy by claiming that the house has been given to a paying guest or a care-taker, converted into a lodging house, or, is under a mortgage with possession.

(e) Tenants who enjoy the protection of the Rent Control sometimes sublet a part or the whole of the premises at a much higher rent than what they pay to the landlord.

3.11 *Other distortions in housing market.*— Provisions like exempting new construction from the purview of Rent Control Act for a period of five years cause considerable difference in rent levels of premises which are equivalent in size, location and amenities but which differ as regards dates of construction. This cause inequities between tenants of older controlled premises and those of new uncontrolled premises. Similarly, the provision of priority in allotment of controlled units favouring politicians and civil servants over other citizens appears contrary to the objectives of rent control.

4. NEED FOR RENT CONTROL REFORMS

4.1. Recognising the short-comings of Rent Control Acts in furthering socio-economic goals, on the one hand, and the need to protect the interest of tenants in a situation of extreme housing shortage on the other hand, a wide range of reforms in rent control in the country have been suggested in the past. This has also lead to periodic amendments of Rent Control Acts in several states in the country. Though the Acts have also been repeatedly challenged as *ultra vires* of the constitution of India or being invalid before the High Courts and the Supreme Court on various grounds such as infringement of fundamental rights, legislative incompetence, in majority of cases that the provisions of the Acts have been upheld by the Courts.

4.2. One of the provisions of the Acts where substantial changes have been effected in almost all the Rent Acts relates to the exemption granted to new housing construction for a limited period. Present Acts of most States provide for rent holiday for a period varying from 4 years to 20 years to new buildings. Further, in order to protect the interests of lower and lower-middle class households, some Acts have incorporated provisions for exempting housing units below a particular rent level.

4.3. The merit of the first reform is that it allows the landlords to receive market rent for their units for the first few years and this is seen as an incentive for new construction of rental housing. However, after the rent holiday period the unit comes under the purview of the rent control and faces all the problems associated with the control. The second reform of decontrolling housing units above a particular rent/floor space level is based on the justification of rent control that it provides the poor and lower middle class tenants with afordable housing. Another argument in favour of this scheme is that it encourages landlords of those units which are just below the decontrol level to upgrade their units. But there are several demerits of this scheme. It helps in improving housing situation only in that sub-market of rental housing where the control has little or no effect. If a rent-level is selected as cut off point for exempting such houses, then, in an inflationary environment, it means decontrolling successively lower quality units. Over a period of time such a scheme may become a political issue where more and more people would start opposing the decontrol. Further, as the fear of control is always there, the negative effects of rent control are unlikely to be diminished.

4.4. In the Tamil Nadu Rent Control Act, residential buildings fetching a rent of over rupees four hundred per month were exempted from the provisions of the Act until recently. The Supreme Court judgement in the case of

Ratlan Arya etc., etc., Petitioners Vs. State of Tamil Nadu and another Respondent has held that the classification of tenants of residential buildings fetching a rent of over rupees four hundred per month into a distinct class for the purpose of depriving them the benefits of the Act by excepting such building from the operation of the Act is without any basis and hence the provision is violative of Article 14* of the Constitution of India (AIR, Sept. 1986). The State Government's plea that the provision is meant to protect the weaker sections of the society was rejected mainly on the ground that the Act also provides protection to tenants of non-residential buildings which means that "a tenant of a non-residential building, who is in a position to pay a rent of Rs. 5000 per month, is afforded full protection by the Act whereas, inconsistently enough, the tenant of a residential building, who pays a rent of Rs. 500, is left high and dry".

4.5. While the rent control exemption based on rent-limit is declared as unconstitutional, the exemption for new buildings for a limited period is held as valid by the Supreme Court. In the case of *Mohinder Kumar, etc., etc., Petitioners Vs. State of Haryana and Another, Respondents,* the provision of the Haryana Urban (Control of Rent and Eviction) Act which provides exemption for a period of *10 years* from the operation of the Act to buildings, the construction of which commenced or was completed on or after the date of commencement of the Act, is held as fair and reasonable (AIR, Feb. 1986). It was argued that the classification has a rational basis and has a clear nexus with the objective of encouraging the constitution of new houses.

4.6. A definite period of rent control exemption is considered fair and reasonable, but the exemption for an unlimited period as provided in the Rent Control Act of Andhra Pradesh is, in the views of the Supreme Court, violative of Art. 14 of the Constitution of India. In the judgement of the case, *Motor General Traders and another, Petitioners Vs. State of Andhra Pradesh and others, Respondents,* the Supreme Court declared the provision of exempting all buildings constructed on and after 26-8-1957 from the operation of the Andhra Act as violative of Article 14 because it was argued that the continuance of the provision would imply the creation of a privileged class of landlords, without any rational basis (AIR, 1984).

4.7. It is clear from the Supreme Court judgements cited above, that the Court has recognised the need for providing exemption of the rent control to new buildings in order to attract investment in construction of rental housing.

4.8. In the case of existing residential buildings, commonly suggested reforms are: (i) to decontrol units as and when they become vacant, (ii) to give rights to tenants to purchase the premises at some reasonable price, and (iii) to provide a mechanism to allow the rent to come up to the market rent level.

Under vacancy decontrol reform, housing units are exempted from the provisions of Rent Act, as and when they become vacant. In this scheme, no tenant experiences a rapid rise in rent on his current unit. However, it has three major disadvantages. First, it discourages tenants from leaving controlled units. And even if they have to move out due to other reasons they try to circumvent decontrol by subletting the unit. Second, it exacerbates the labour and household immobility. Finally, under this scheme, it becomes difficult to remove control completely at some future date.

The second scheme of giving tenants the right to buy the premises is considered unfair to landlords as it puts landlords and tenants in a bilateral bargaining situation in which the weaker loses. It also affirms the fears of landlords of losing their properties, and thus, can have far reaching effects on new investment in housing.

The third alternative of relaxing the provisions of rent control is to allow the rents to come up to the level of market rents over a specified period of time. However, the mechanism required for such a strategy would have to be place-specific as the rent patterns of existing controlled markets vary considerably from one city to another.

4.9. Currently, several state governments in the country have been considering major reforms in their Rent Acts in order to rationalise certain main provisions of the Acts and to improve their implementation.

For example, the Karnataka Rent Control Amendment Bill, 1986 proposes to bring about the following major reforms in the Karnataka Rent Control Act (Govt. of Karnataka, 1986).

(1) The Act is to be made permanent to avoid frequent statutory extension of the Act.

(2) New construction is to be exempted from the provisions of fair rent and intimation of vacancy for a period of 7 years as against the present period of 5 years.

(3) A statutory duty is cast on the tenant to report vacancy of the premises at the time of vacating the premises.

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* Article 14—Equity before Law : The State shall not deny to any person equality before law or equal protection of the laws within the territory of India (The Constitution of India, Part III. Fundamental Rights).

(4) The provision requiring intimation of vacancy will not be applicable to residential buildings of monthly rent not exceeding Rs. 100 and non-residential buildings of monthly rent not exceeding Rs. 200.

(5) Rate of return on the investment for the computation of fair rent to be increased from 6 per cent to 8 per cent in the case of residential buildings and to 12 per cent in the case of non-residential buildings.

(6) Provisions are incorporated for immediate automatic escalation and then periodic escalation of the fair rent according to certain scales subject to a certain maximum in the case of those existing tenancies the fair rents of which have already been fixed.

(7) The tenant of a premises is to be given the first option to purchase it at a reasonable price if the landlord intends to sell the premises. If there is any dispute about the reasonable price, it is to be determined by the Rent Controller and shall be not less than fifty times and not more than one hundred and fifty times the aggregate of the fair rent and permissible increases.

(8) One time provision is to be incorporated in the Act to regularise unauthorized occupation of premises.

(9) Non-residential buildings fetching rents about Rs. 2,000 per month and residential buildings fetching rents above 5,000 per month are to be exempted from the operation of the Act.

Besides the above major proposed amendments, the Bill also seeks to incorporate/revise certain other provisions in the Act relating to punishments for various offences, exemption to Government buildings, relief against eviction, appeals against orders passed by Rent Controller, paying guests/lodgers etc.

Although some of the reforms proposed in the Karnataka Rent Control Amendment Bill are aimed towards rationalising certain main provision of the Act and improving its implementation, the total package of reforms is not likely to be of much help in improving the housing situation.

4.10. The Economic Administration Reforms Commission (EARC) headed by L.K. Jha has also recommended, in September 1982, several reforms in the rent control legislation in order to bring "a better balance between the rights of tenants and those of the landlords, and between the interests of those who are already in occupation of rented accommodation and those who are seeking such accommodation" (Government of India 1985). The main recommendations of the Commission are summarised below:

(1) The area of operation of rent control should be restricted by excluding accommodation hired for non-residential use (except perhaps small shopkeepers), accommodation for residences of diplomats and other foreigners, tenancies in premises owned by Government and local bodies etc.

(2) Possibility of continuing rent control to the relatively modest premises should be considered.

(3) All new construction for rental purpose and houses let out on rent for the first time should be exempted from rent control for the first five years.

(4) The determination of fair rent should be delinked from the actuals of construction costs. One improvement could be to determine cost on the basis of indices of landvalues in different localities and standard construction cost per square metre updated frequently. The calculations of reasonable return on this estimated cost should take into consideration the interest on fixed deposits in banks, municipal taxes and cost of repairs and maintenance.

(5) However, it is better to avoid calculations based on costs etc. In the case of new construction and houses let out on rent for the first time, the rent prevailing at the end of the five year decontrol period should become the controlled rent with provision for subsequent periodic revisions.

(6) In exceptional cases, Rent Control Authority should determine a fair rent having regard to prevailing rent for comparable accommodation in the area.

(7) Rents should be revised for the neutralization of 50% of the incidence of inflation, once in every five years, based on urban non-manual employees' consumer price index. In case of property which is coming under control for the first time, the first revision may have to be made immediately on the commencement of control, if during the preceding five year rent has remained unchanged.

(8) In the case of existing tenancies where rents have remained frozen for at least five years, it is necessary to update the rents so as to neutralise 50% of the inflation from the initial determination of rent to the present, such updated rent should be given effect to in a staggered manner to avoid sudden, sharp increase in rentals.

(9) In the case of new rental housing, the commencement of control after the first five years need apply only to the rent; the period of occupancy, the condition for its renewal, termination of tenancy should be left to be regulated by the lease agreement, which should be respected by law. The landlords should

not be allowed to use a change in tenancy as a means of raising the rent.

(10) In respect of existing tenancies, the law should enable the owner to regain possession of his premises after giving six months' notice to the tenant, if the owner requires the house for self occupation.

(11) The resolution of disputes between landlord and tenant should be taken away from the judiciary and entrusted to administrative tribunals. These Rent Control Tribunals should be one-man tribunals presided over by judicial or revenue officials of the rank of District Munsiffs or SDOs or DROs, or by a retired judge or Collector in appropriate cases. They should follow summary procedures. One appeal from decisions of such tribunals should lie to a Special Court presided over by an officer of the rank of District Judge. The tribunals should also be given power of execution.

(12) There should be a Central law relating to rent control in Cantonment Areas.

Besides the above recommendations related directly to rent control legislation, the Commission has also made recommendations with regard to various other issues relevant to urban housing such as, need for larger investment in urban housing, public housing programme, raising resources, role of private sector, housing finance agencies, urban land policy.

5. SUGGESTIONS FOR REFORMS

5.1. In view of several adverse economic effects of Rent Control Legislation on housing market on the one hand and the need for providing protection to tenants in a situation of extreme housing shortage on the other hand, it is desirable to modify the scope of the Rent Control Legislation and restrict it to protect only those sections of society which really need to be protected. However, in a situation of excess housing demand, a strategy to bring about this modification has to be worked out in such a way so as to minimise any increase in rent, and other hardships to existing tenants. The choice of such a strategy must be weighed in terms of equity consideration, the probable impact of the strategy on improvement in housing situation and the tax base of local authorities, implementation of the strategy and its public acceptance. As the tenants (who tend to overestimate the benefits of rent control and underestimate its costs) form about two-thirds of the population in a metropolitan city, public acceptance should be an important consideration in this regard.

5.2. The rent control reforms, therefore, should be based on the following objectives:

(1) to continue the protection of existing tenants;

(2) to promote better repair and maintenance of rental housing;

(3) to attract investment in rental housing;

(4) to improve the tax base of local authorities by allowing realistic valuation of properties; and

(5) to reduce the element of black money in the housing and real estate market.

5.3. To achieve the above objectives, major reforms in rent control legislation should be worked out with reference to the following two principal sub-markets of rental housing:

(1) Existing tenanted premises.

(2) New rental premises constructed or rented for the first time.

The detailed suggestions for reforms in respect of each of the above categories are described in the following paragraphs.

5.4. *Existing tenanted premises.*—The tenant protection as envisaged in the present laws should continue in respect of all existing tenancies. However, certain periodic increase in rent in tune with the general inflation should be allowed. The policy of such increase in rent should be worked out separately for each of the following three types of tenancies:

(a) non-residential,

(b) residential with floor space more than 80 Sq.m., and

(c) residential with floor space upto 80 Sq.m.

The cut-off floor space limit of 80 Sq.m. is identified on the rationale that it would cover about 60% to 80% of existing tenancies belonging to lower and middle class households in most cities. For example, in the case of Bangalore city it would cover about 80% of the renters (Table 5).

The policy of rent adjustment for each of the above types of tenancies may be as follows :

(i) Existing Non-residential tenancies :

In the case of existing non-residential tenancies, it is suggested that landlords may be permitted to increase the prevailing rent (standard or agreed) to neutralise 100% the incidence of inflation from the date of fixing of the prevailing rent. However, in order to avoid excessive increases in rents, for tenancies existing prior to 1974, that year may be treated as the base year for calculating the incidence of inflation similar to the base year for determining the capital gains tax. The inflation may be measured by the Urban Non-manual Employees Consumer Price Index. The total

increase may be given effect over a five year period. This increase in rent must be used for repairs of the building, wherever necessary.

In addition to the correction of past stagnation of rents, rents should be allowed to be increased in proportion to the changes in CPI of Urban Non-manual Employees (100% neutralisation of incidence of inflation). This adjustment should also be effective during the first five year period as well.

Where existing tenant vacates the premises, the rent for the new tenant will be contractual rent mutually agreed between the landlord and the new tenant. Such rent will not be guided by the above provisions of permitted increases. Obviously, this would imply that sub-tenancies be treated as illegal. This would be a significant reform as it would help reduce incidence of key money and enable true reflection of property values in the municipal tax base.

(ii) Existing Residential tenancies with a floor space more than 80 sq.m. :

The strategy for this category of tenancies would, essentially, be similar to that described above for the non-residential tenancies, except that the neutralization of the incidence of past inflation should be to the extent of 50 per cent.

(iii) Existing Residential tenancies with floor space upto 80 sq.m.:

The policy for this category of premises may be confined to neutralisation of future incidence of inflation. The effect of past inflation may be ignored. This would avoid large sudden increases in rents for majority of existing residential tenants. Further, in this case, even the new tenants should receive the benefit of regulated rents (updated rents from time to time).

5.5. *New rental premises constructed or rented for the first time.*—The policy for this class of premises should essentially be that of allowing rents to be governed by mutually agreed contractual rents. The only exception should be the residential units having floor space upto 80 sq.m. In such cases, the first agreed rent should be treated as base rent, and this may be allowed to be increased in proportion of changes in the CPI of Urban Non-manual Employees. Such updated rents should also apply in cases where tenancies change and new tenants come in.

5.6. *Occupancy rights.*—Sufficient protection to tenants against indiscriminate eviction as provided in the present rent laws should continue for all existing tenancies as well as for new residential tenancies in premises with floor space upto 80 sq.m. However, in the cases of new non-residential tenancies and new residential tenancies in premises with floor space more than 80 sq.m., the period of occupancy should be determined by the provision of the lease agreement on which the premises is rented.

Requirement of premises for self occupation by the landlord as a ground for eviction of the tenant has been recognised by all the rent laws in the country. But, the requirement has to be proved by producing sufficient relevant material before the court, which is a very long drawn process. This procedure of recovery of premises, particularly on the ground of self occupation, should be made simple by necessary administrative mechanism as described later in this chapter.

5.7. The Rent Control Acts of many States also address other issues like tenant-owner relationship, responsibility for maintenance, procedure for eviction, allotment of vacant houses, reporting of vacancy and limited tenancy etc. Ten States in the country have provisions for re-allotting rent controlled accommodation to new tenants after the house becomes vacant. The States like Tamil Nadu, Karnataka and Madhya Pradesh have laid down such preference and surprisingly they include many affluent sections of the society.

It is suggested that the provisions such as reporting of vacancy, allotment of vacant houses by Rent Controller as per the prescribed priority list should be deleted from the Rent Acts. The deletion of these provisions would help in eliminating a number of malpractices which exist in those markets where such provisions are there in the Rent Acts. This would also enable the landlords to select tenants of their choice.

5.8. *Administration.*—The administration of above policy requires re-orientation (and not repulsion) of existing rent legislation. The reorientation has to be in respect of the following:

(1) The emphasis should change from controlling rents to providing a framework for landlord tenant contractual relationship.

(2) The emphasis should be on providing efficient mechanism for resolving landlord-tenant disputes including eviction and recovery of possession.

(3) The passive provisions for repairs and maintenance should give way to more effective provisions to ensure upkeep of buildings as assets of societal value.

The reoriented legislation should, therefore, contain the following provisions:

(i) provisions to regulate mutually agreed contracts of landlords and tenants;

(ii) provisions to ensure that landlords fulfil their obligations, particularly in respect of upkeep of their premises;

(iii) provisions defining the obligations of tenants and to provide for termination of tenancies if the tenants do not fulfil their obligations;

(iv) provisions to provide protection to tenants against indiscriminate eviction; and

(v) provisions to set up an administrative machinery for—

(a) announcement of permissible yearly increase to neutralise the incidence of inflation in the case of existing tenancies,

(b) expeditious resolution of disputes between tenants and landlords;

(c) prompt recovery of possession of the premises by the landlords or any other person whose claim has been upheld and

(d) registration of rents with local authorities so that such rents could be easily used for determining rateable values. The data on registered rents should also be made available to public on payment of fees to defray the administrative costs.

5.9. Ensuring adequate upkeep of building is however, difficult to administer. Most rent laws allow landlords or tenants to repair building and allow commensurate rent adjustment. However, in many cases, neither the landlord nor the poor tenant are interested in the upkeep of the building. Having allowed significant relaxations in rent control, it would be justifiable to have more stringent provisions to ensure upkeep. The local authorities should periodically inspect buildings and issue notices to landlords and tenants to undertake repairs. In case of default, local authority (or suitable state agency) should carry out repairs and recover these at penal rates from landlord/tenant. Local authorities should accept these responsibilities as their tax base is going to improve considerably consequent upon the rent control reforms. However, ensuring use of increased rents on account of neutralisation of past inflation for repairs as suggested above, needs a suitable administrative mechanism which is sensitive to local situation. State Governments may therefore devise suitable systems for the purpose.

5.10. In order that issues arising out of the administration of the Rent Control Act may be dealt with expeditiously, it is recommended that litigation be brought out of the purview of the civil courts and entrusted to quasi-judicial tribunals. These tribunals should adopt a summary procedure for expeditious disposal of cases. As suggested by the Economic Administration Reforms Commission (Government of India, 1985) in regard to their proposal for a rent control Tribunal, the suggested Tribunal should take action on the written plaints and affidavits of parties, and as far as possible, decide on such written affidavits or statements, minimising the need for oral evidence. The tribunals should also be given powers of execution. The decisions of these tribunals should be subject only to one appeal, restricted to questions of law to an appellate tribunal.

5.11 *Related Policies.*—The intended objectives of the rent control reforms, particularly those related to increasing the supply of housing units will also depend upon housing finance and supply of serviced urban land. Suitable reforms in legislations like Urban Land (Ceiling and Regulation) Act, Town Planning Acts and zoning and building codes prepared thereunder are also needed to derive maximum benefit from the proposed rent control reform.

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TABLE 1 : Enactment of Rent Control Legislation in Various States in India.

State	Name of the Present Act	Year of enactment of the present Act	Years of enactment of earlier Acts
1	2	3	4
Andhra Pradesh .	Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act	1960	1953, 1954, 1949.
Assam . . .	The Assam Urban Areas Rent Control Act	1972	1946, 1949, 1956, 1962.
Bihar . . .	The Bihar Building (Leases, Rent & Eviction) Control Act . .	1977	1942, 1946, 1947.
Bombay . . .	Saurashtra Rent Control Act	1951	1918, 1918, 1920, 1923, 1939, 1942, 1942, 1944, 1947
Delhi . . .	The Delhi Rent Control Act	1958	1939, 1939, 1941, 1944, 1946, 1947, 1952, 1956, 1956.
East Punjab . .	The East Punjab Urban Rent Restriction Act (Extension to Chandigarh).	1974	1941, 1947, 1949, 1949.
Goa, Daman and Diu	The Goa, Daman and Diu Buildings (Lease, Rent and Eviction Control Act	1968	..
Haryana . . .	The Haryana Urban (Control of Rent and Eviction) Act . .	1973	..
Himachal Pradesh .	The Himachal Pradesh Urban Rent Control Act . . .	1971	..
Jammu and Kashmir	The Jammu and Kashmir Houses and Shops Rent Control Act .	1966	Circular No. 136 1952.
Karnataka . .	The Karnataka Rent Control Act	1961	1941, 1951.
Kerala . . .	The Kerala Buildings (Lease and Rent Control) Act . .	1965	1950, 1959, 1959.
Madhya Pradesh .	The Madhya Pradesh Accommodation Control Act . .	1961	1946, 1949, 1946 1950, 1956, 1957 1950, 1950, 1955 1955.
Meghalaya . .	The Meghalaya Urban Areas Rent Control Act . . .	1972	..
Orissa . .	The Orissa House Rent Control Act	1967	1947, 1947, 1952 1952, 1958.
Pondicherry . .	The Pondicherry Buildings (Lease and Rent Control) Act . .	1969	..
Rajasthan . .	The Rajasthan Premises (Control of Rent and Eviction) Act .	1950	1948, 1948, 1949 1949, 1944.
Tamil Nadu . .	The Madras Buildings (Lease and Rent Control) Act . .	1960	1941, 1941, 1945, 1945, 1946, 1949.
Uttar Pradesh . .	The U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act.	1972	1946, 1947.
West Bengal . .	The West Bengal Premises Tenancy Act	1956	1920, 1923, 1924, 1949, 1943, 1946, 1948, 1950.

Source : Kochatta (1984).

TABLE 2 : Selected Features of Rent Control Acts of Different States/Union Territories.

State/Union Territory	Year of Enactment of the present Act	Initial period of exemption, if any	Period allowed for reporting vacancy, if required.
Andhra Pradesh .	1960	Indefinite when Rent > Rs. 1000; 10 years when Rent < Rs. 1000.	10 days
Assam . . .	1972	None	..
Bihar . . .	1977	None	..
Delhi . . .	1958	None	7 days
Goa, Daman & Diu .	1968	4 years	..
Gujarat . . .	1947	None	..
Haryana . . .	1973	10 years	..
Himachal Pradesh .	1971	None	..
Jammu & Kashmir .	1966	Where annual income of tenant > Rs. 20,000	..
Karnataka . .	1961	5 years	15 days
Kerala . . .	1965	None	15 days
Madhya Pradesh .	1961	5 years	As per Orders
Maharashtra . .	1947	None	..
Meghalaya . .	1972	None	..
Orissa . . .	1967	5 years	..
Pondicherry . .	1969	None	7 days
Punjab . . .	1949	None	..
Rajasthan . .	1950	None	..
Tamil Nadu . .	1960	5 years, and when rent > Rs. 400	7 days
Tripura . . .	1975	None	15 days
Uttar Pradesh . .	1972	10 years/20 years	7 days
West Bengal . .	1956	None	..

TABLE 3 : Order of Priority in Allotment of Residential Buildings in Karnataka Rent Act.

Order of Priority	Public Authority/Person
1.	Direction holder
2.	Government of Karnataka (for any Minister, Judge of the High Court or Tribunal, Member of the Legislature, the Presiding Officers of the Legislature, Deputy Presiding Officers, Government Whips of both the Houses, Members of any Committee or Board or Corporation or its employees).
3.	Central Government (for its employees)
4.	Any person who vacates the Government residential accommodation or who has been evicted from Government buildings.
5.	Any person who has been served with notice for termination of tenancy under the proviso to clause (b) of Section 21-A.
6.	Any person who has been ordered to be evicted under Clause (h) of Sub-Section (1) of Section 21
7.	Any other public authority for providing accommodation to its employees
8.	Members of the State Legislature or Parliament
9.	Officers employed under the State Government
10.	Officers employed under the Central Government
11.	Officers employed under any public authority
12.	Honorary Medical Officer employed in Government Hospitals in the area in which building is situated
13.	Part-time Professors or Lecturers employed in the Government Colleges in the area
14.	Persons employed in any Bank
15.	A member of any Committee, Board or Corporation constituted by the Government of Karnataka and who is required by virtue of his position as such member to reside in the area.
16.	Any person employed in Indian Institute of Science, Indian Council of Agricultural Research, and Council of Scientific and Industrial Research.

Note : Priority 9 to 16 are applicable only if the person concerned is not in possession of any alternative accommodation.

Source : Government of Karnataka (1984).

TABLE 4 : Basis of Determination of fair rent in Rent Acts of different States.

State/Union Territory	Percent rate of return, if any, used in the computation of fair rent	Main basis of determining fair rent of recently controlled units
Andhra Pradesh	..	Circumstances of the case including any premium paid
Assam	7½ per cent	Estimated cost of construction and the market price of land together with municipal taxes payable.
Bihar	..	Controller to determine as he thinks fit
Bombay	..	Rent at which first let or standard rent to be fixed by Court
Delhi	7½ per cent; 8⅝ per cent.	Reasonable cost of construction and the market price of land on the date of commencement of construction.
Goa	7½ per cent	Market value of building and land on date of completion
Haryana	..	Rent agreed upon between landlord and tenant
Himachal Pradesh	..	Prevailing rates of rents
Jammu & Kashmir	..	Controller to determine fair rent as per schedule A
Karnataka	6 per cent	Cost of construction
Kerala	..	Property tax; prevailing rents
Madhya Pradesh	6¾ per cent	Actual cost of construction and the market price of land on the date of commencement of construction.
Meghalaya	7½ per cent	Cost of the building and land
Orissa	..	Rent considered reasonable having regard to situation, locality, house condition.
Pondicherry	6 per cent	Total cost of building calculated according to prescribed rates
Punjab	..	Prevailing rates of rents
Rajasthan	..	Rent at which first let; prevailing rents of similar premises
Tamil Nadu	9 per cent	Total cost of building
Tripura	..	Agreed rent between landlord and tenant
Uttar Pradesh	10 per cent	District Magistrate to fix on the basis of cost of construction, maintenance and repairs, prevailing rents of similar buildings.
West Bengal	6¾ per cent	Cost of construction and land.

TABLE 5 : Distribution of Renters by floor space of their dwelling units—Bangalore City, 1974.

Floor Space (sq. ft)	Percentage households	Cumulative percentage
Upto 100	11·4	11·4
101 — 200	24·0	35·4
201 — 300	19·2	54·6
301 — 500	15·6	70·2
501 — 800	10·1	80·3
801 — 1000	7·2	87·5
1001 — 1200	5·8	93·3
1201 — 1600	3·9	97·2
1601 + ...	2·8	100·0
Percent households in Rented dwellings :		62·8
Percent households in owned dwellings :		32·9
Percent households in other dwellings :		4·3
Total sample size :		1745

Source : Prakasa Rao and Tewari (1979)'s data base.

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URBAN PLANNING POLICY & LAW

THE INDIAN LAW INSTITUTE
NEW DELHI

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Upendra Baxi

CONSTITUTIONAL AND LEGAL PERSPECTIVES ON URBANISATION POLICY & HUMAN RIGHT TO SHELTER : RECOMMENDATIONS TO THE URBANISATION COMMISSION

A. INTRODUCTION : PERSPECTIVES

1.1. The Indian Law Institute is honoured to have been associated with the Urbanization Commission in its historic national tasks. We submit herewith as per the project statement submitted to the Urbanization Commission (see Appendix A), the specialist studies on various constitutional and legal aspects of 'urbanization' in India. The Institute proposes to publish these studies in its quarterly *Journal* on monographically next year, in order that the information and insights generated thus are more widely accessible.

1.2. This submission reflects, and builds, on the research findings and recommendations arising out of these studies. It also explores the problem of the strategies of effective legal intervention in the urbanization processes and planning from the standpoint of constitutional and human rights and freedoms and of a "sustainable development" articulated by the World Commission on Environment and Development (the Brutland Commission).

B. THE CONSTITUTIONAL PERSPECTIVE

2.1. The Urbanization Commission must be fully informed by the letter and spirit of the Indian Constitution and not merely because it is technically a part of the notion of state under Article 12 and 36. Its members are Indian citizens and accordingly bound by the Fundamental Dutes of Citizens enunciated by Article 51-A of the Constitution. In what precise ways does the Constitution orient the Commission to its salient tasks ?

2.2. The overarching obligation imposed by Article 38, a Directive Principle of State policy, I believe, ought to inform all the work of the Commission. Not merely does that Article in clause (1) express generally the constitutional obligation of the state to "strive to promote the welfare of the people by securing and promoting, as effectively as it may, a social order in which justice social, economic and political shall inform *all institutions of national life*" but also it lays a more specific obligation by clause (2) :

> The State shall, in particular, strive to minimize the inequalities in income, and endeavour to *eliminate inequalities in status, facilities and opportunities,* not only amongst individuals but *also amongst groups of people residing in different areas* or engaged in different vocations (emphasis added).

2.3. Even this specific obligation is further crystallized. Article 47 casts upon the Indian State the "primary duty" to raise the "level of nutrition and standard of living of its people" and "the improvement of public health"; Articles 39(*e*) and (*f*) direct attention of the state, in terms of specific obligations, to the vulnerable sections of society, especially men and women workers, children and Article 41 compels state solicitude to special at vulnerabilities imposed by "unemployment, old age, sickness and disablement and ... other cases of underserved want." And Article 48-A casts a specific duty on the State to "protect and improve environment."

2.4. Clearly, then, the Commission is constitutionally required to consider and promote policies which urge state intervention in ways which will promote the fulfilment of these obligations under the Constitution. Article 38(2) specifically embraces urbanization planning and policy by its mandate to "eliminate inequalities in status, facilities and opportunities" amongst "groups residing in different areas"; it is true that a part of the problem of the growing cities, potential megacities of India, has precisely arisen because of the inability of state policies to be more fully informed by the letter and spirit of this Article. The constitution-makers perceived forty years ago in this enduring expression of the duties of the State that regional inequalities in "status, facilities and opportunities" may well create all that we now sum up as the problem or the crisis of urbanization in India.

2.5. They were also aware, with an acuteness that does not characterize much of law and administration since the adoption of the Constitution, that specific duties of furtherance of nutrition and quality of life for people who are specially vulnerable was peculiarly important in a situation of growing urbanization.

2.6. At the same time, the Fundamental Rights embodied in Part III of the Constitution direct the choice of appropriate means to deal, among other things, with the urban challeng'. Some means are prohibited. Under Article 14 the state may not achieve any of the ends of Part IV through wholly arbitrary and irrational exercise of public power, whether through executive or legislative action. It may not take away or abridge any of the rights guaranteed by the freedom enshrined in Article 19. Of particular relevance are those enshrined in Article 19(1) (*d*) and (*e*) : the rights to freedom to move and to reside and settle in any part of the territory of India. These rights may only be reasonably restricted by laws either in the interests of the general public or for "the protection of the interests of any Scheduled Tribe." Courts have upheld such restrictions but, under the head of interests of the general public most legislative restraints have been imposed to serve police and security purposes. Any policy of restricting

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internal migration law will have to run the gauntlet of the rights guaranteed in Articles 14 and 19, more so when a challenge to such laws entail an acknowledgeable failure of the state's constitutional duties under Article 38(2).

2.7. With the abolition of the right to property as a fundamental right, and enunciation of Article 300-A by the Forty-Fourth Amendment, the restraints on the state's eminent domain powers[1] may not now loom very large. But we must recall that under the new Article 300-A every person has a constitutional right, though not a fundamental one any more, *not* to be "deprived of this property save by authority of law." It is true that this Article does not even suggest that property should be acquired for public purpose, let alone require any kind of just compensation. But distinguished scholars have opined[2] that acquisition permissible only under the authority of law has to be acquisition under a law which fully satisfied the rigorous demands of Article 14. It would be then a mistake to look upon the elaborate jurisprudence on Article 31 as mere history.

2.8. Nor should urban planning and policy overlook the changing dimensions of Article 21: the right to life and liberty. The post-emergency Supreme Court in *Maneka Gandhi* has laid the beginnings of a very expansive interpretation of the phrase 'life and liberty' as the decision of the Supreme Court, among others, in the *Olga Tellis* shows.

The right to livelihood may not be readily disturbed, even when the Court in *Olga Tellis* allowed, in effect, the Municipal Code significance to prevail over the Constitution of India, as interpreted by it.

2.9. The importance of the restraints imposed on state power and policy through fundamental rights lies in this : individuals shall not merely be treated as *objects* of executive and legislative power and policy they are also constitutional entities *with* rights. All democratic and constitutional solutions requires respect for these rights, which may indeed be dynamically and expansively interpreted by courts, especially the Supreme Court of India, from time to time. Policy planning concerning urbanization must stand fully informed on the limits of state power imposed by basic rights of citizens. The rights are, of course, not absolute; nor do courts readily place obstacles in the fulfilment of the duties of the state laid down by directive principles of state policy. If such a charge had some plausibility in the first two decades after Indian independence, this is not so now.

2.10. As citizens memebers of the Commission ought, further to be clearly guided by the Fundamental Duties in Article 51-A. Insofar as the urbanization crisis may have some causal bearing on the "sovereignty, unity and integrity of India" the citizens constituting the Commission have to articulate ways and means to "uphold and protect" these values (Article 51-A (*c*)). The same must be said concerning Article 51-A (*e*): how can the Commission devise appropriate sets of policy which will assist communal harmony, fraternity, and gender justice, while at the same time ensuring us per clause (*f*) "the rich heritage of our composite culture?" Similarly the duty to safeguard "natural environment" (clause (*g*)) is also crucial to the tasks before the Commission. And the very onerous duty to provide congenial atmosphere to all citizens in which individuals and collectivities are inspired to "strive towards excellance ... so that the nation constantly rises to higher levels of endeavour and achievement," must be specially discharged by the Commission since the present (and not just metaphorically) carcinogenic growth of cities creates a ghettoization of minds inimical even to the grasp of notions of excellence.

2.11. In my view, the text of the terms of reference of the Commission have to be read in the context of the Constitution, especially the mandate of the Fundamental Duties, Directive Principles and the Fundamental Rights. The Commission needs to take a comprehensively constitutional approach in construing its terms of reference.

C. THE LEGAL SYSTEM PERSPECTIVE

3.1. No planned endeavour to meet the urban challenge can succeed in its major tasks if it ignores what we here call legal system perspective. A legal system has normative, institutional/behavioural and cultural dimensions. An improverished understanding of the legal system is manifest in much social planning and policy reform measures in contemporary India.

3.2. It must, first of all, be clearly understood that effective translation of policy into state action quite often entails its formulation into a *law*. The usual approach of policy-makers and planners is to evolve a general policy, get it adopted at the highest levels and then entrust it to the legislative drafting department for enunciation of the law. This approach is bound to miscarry because the legal resources are conceived very narrowly as having to do with mere translation of law-policy into well-drafted laws. Legal resources must be harnessed at the very policy-making stage for at least two important reasons: *first*, planners and policy-makers may learn the precise nature of limits and opportunities for

1. See A. Dhanda, "Judicial Process and Urbanisation" *infra* at 99.
2. See T. K. Tope, "Forty-Fourth Amendment and the Right to Property" 1979 (4) SCC 27 and P. K. Tripathi, "Righ of Property after Forty Fourth Amendment—better protected than ever before" AIR 1980 (jour) 49.

state action and *second,* those who would ultimately draft the law would understand better than under the current method the precise problems to which the evolution of a policy seeks to respond. It is a costly mistake to think that law persons have very little to contribute to policy-formation and that policy-formation should remain autonomous of specialist darftspersons and related legal resources.

3.3. The present approach which separates policy formulation from law making tends, both in short and long runs, to frustrate the achievement of the objectives of the policy itself. For example, the Urbanization Commission has in its First Interim Report suggested the retention of the Urban Land (Ceiling and Regulation) Act, 1976, with further rationalization and ease of implementation.[4] The very first recommendation is that "all excess lands must be indentified and notified as surplus and made liable to acquisition." The second recommendation is that all surplus vacant land "must be quickly released for city development" with special reference to economically weaker sections of society.

3.4. The recommendations are indeed worthwhile. But how is the draftsperson of the proposed amendment to formulate these into law? The first recommendation suggests *proactive* administrative set-up whereas the Act, broadly, sets up a *reactive* administration. The second recommendation suggests the need for expedition in allocation of surplus land; how is the legislative drafts person going to translate this--"as soon as may be," "within a reasonable period of time," or within the "prescribed period of time?" And what criteria would help the draftsperson identify "the occasionally weaker sections?" Are the "weaker sections" to be described in the same sense as in agrarian reform measures or programmes for the allievation of rural impoverishment? Or are different additional indicators necessary?

3.5. Another very important, and well meaning recommendation is that the "entire proceeds of the vacant land cess/tax and penalties for misuse be credited to a Shelter Fund." The Commission estimates that the Indian State could recover close to Rs. 600 crores per annum from these sources for the Shelter Fund. Because the recommendation is so basic and just, policy formulators must ask : how are we going to able to achieve this? Through penalties which will be, as Recommendation 8 proposes, "recoverable as arrears of land revenue?" or, as is also suggested, through outright "confiscation?" How is the draftsperson to proceed? She might be advised that outright confiscation may revive the ghost of Article 31 through Article 14 of the Constitution; she might then proceed to recover high penaltics as arrears of land revenue, a cumbersome and inefficient procedure. Unless the Commission in the very act of policy formulation is able to provide an adequate realization procedure, the Shelter Fund will simply be a symbolic exercise. Similarly, how is the Shelter Fund to be provided for in the amended law? If it ends up as another ill-thought out bureau, there will be no scope for effective utilization of the fund monies for the urban poor. Obviously, the Fund Authority is also contemplated to be an allocative authority, because the proceeds collected from each city are to be utilized for that city, specifically for "land acquisition and development of serviced sites for the urban poor." Surely, it is crucial for the policy enunciators to provide a detailed blue print of the Shelter Fund Authority as well as operationalization of the "urban poor". Should the fund not include in its management board non governmental representation, from social action groups, voluntary agencies, institutes of town-planning and management, university specialists and representatives of the so-called "urban poor?" Should not a decision making schedule be provided for the quick allocation of monies to the city concerned? Should we not think of a broad representative mechanism for the provision in each city for "the development of service sites for the urban poor?" And should we not lay down, though not an inflexible, order of priorities that this conception necessarily entails in terms of basic human needs and rights? Should we leave all this concertization for a later date and by a bunch of backroom drafting people? Should there not be adequate legal designing done at the very level of policy formulation with the help of key legal resource personnel?

3.6. The formulation of a policy, we wish to firmly suggest, is condemned to incompleteness and eventual frustration if the policy ignores the very programmatic nature of the law. Like policy which it translates into authoritative state action potential, the law must be viewed always as a *programme of action.* The idea that such a programme can be arbitrarily divided into tasks first of major policy enunciation and then into law-making reduces, in the last analysis, all policy formulations of *gestures* rather than *programmes* of action. I urge the Urbanization Commission to avoid such a separation : the original Land Ceiling Act which it seeks to amend was itself a product of such a separation and its lesson is that the best way to programme inefficient and unjust implementation of a policy is to treat policy and law as separate realms.

3.7. The management of sanctions, another vital aspect of policy and law, is virtually also a casualty of separation of policy from law-making tasks. The problem of management of sanctions must be looked at in terms of the control over, and change in, the targetted behaviour of the subjects of policy-law regulation. What array of disincentives will deter conduct violative of policy and law? Though here moves, if at all,

4. *Interim Report* National Commission on Urbanisation para 2.13 (1987).

on the classic cocktail of imprisonment or fine or both. But control of behaviour in which strong economic interests contend should be subject to experimentation in sanctioning devices; sanctions need not always be negative, rewards can also be used. If at the stage of policy-making the entire question of management of legal sanction is considered trivial, and left to the standard forms of law, the degree of effectiveness of the law is thereby genetically pre-determined. The so-called absence of political will at the stage of implementation/enforcement is nothing other than an extension of the absence of political will at the policy formulation stage. Recommendation 3 in relation to the Land Ceiling Law amendment in the Interim First Report shows some sensitivity to the problems of incentives. This is welcome. But not as a substitute for a more fully fledged analysis of the management of sanctions which will make compliance with the law more in keeping with the economic self-interest of the owners of land and its violation more costly.

3.8. The issue of the management of sanctions also relates to sanctioning the administrators under the various laws themselves. If the policy enacted into law has to have any credibility as a programme of action, it becomes necessary to ponder the structuring of bureaucratic action and procedure in some considerable detail. Not merely the clarity of organizational detail—herarchy of powers and jurisdiction autonomous functioning in most statutory matters and clarity of substantive provisions of the law itself has to be provided but also *temporal planning* is necessary. At the present juncture, neither policy nor law makers are concerned with time as a social resource for social change through the policy and law. Neither provide any consideration to it.

3.9. To revert to the examples taken so far: what does the advice in Recommendation 2 in relation to surplus land under the proposed amendment[5] really mean? How are the rhythms of bureaucratic implementation behaviour to be structured? The question is not answered merely by prescribing reasonable time-schedules for various steps in the exercise of statutory power. The schedules themselves have to motivate the bureaucracy to act: policy and law ought to provide an array of incentives and disincentives, positive and negative sanctions, in this realm here. One way of doing this beyond the hierarchical departmental constraints, is to make senior, supervisory officers liable both in terms of civil and criminal action; another way is to provide a system of incentives for efficient discharge of duties, beyond the normal rewards in time scale. Yet another way is to endow citizens with certain rights to performance of statutory duties.

3.10. The problem of management of sanctions is also crucial in regard to the *zone of silence* in all policy formation and law making endeavours. The zone of silence relates to administrative deviance, especially in the area of corruptibility. Some of the best thought out policies and laws fail their purpose because the problem of deviance is not frontally tackled in their enunciation. It is generally thought that either this problem is best tackled through laws and policies of a general kind dealing with administrative corruption or that this is a problem we have to live with or a 'developmental' cost that we have to bear. There might be some wisdom in both these positions. But every area of policy/law which targets certain behaviours for regulation also increases simultaneously the potential scale for corruption. Sensible, policy formulation and law-making in specialized arena like urban planning should, I believe, place this problem right on its agenda and devise ways and means, both at policy enunciations and legal structurings, and before arriving at the decision that these are costs to be necessarily borne, address the issue of management of sanctions to such administrative deviance.

3.11. In addition, provision should be made in the laws themselves for their periodic reviews and revisions. The method of evaluation of the impact of legislation must be specified in the laws. The present method of setting ad hoc committees and commissions follows no other rationale than expediency. They, too, have to rely on commissioned research, assembled in haste, to renovate policies and suggest amendments to the laws. If laws are to more effectively achieve intended purposes, their annual monitoring in terms of administrative and judicial implementation through designated governmental and non-governmental agencies should be prescribed by statutes themselves. Even if committees and commissions are then appointed, they would start their programme of work with a scientifically accurate and viable material which would furnish starting points for alternative changes in policy and the law.

3.12. In other words, we plead for a through-going initiative on the part of the Urbanization Commission in innovating ways of translating policies into laws. Only when this is done that the law will emerge as a programme of action for social change with credible potential.

D. THE RIGHT TO SHELTER : PROPOSALS FOR CONSTITUTIONAL AMENDMENTS.

4.1. On basic constitutional perspectives, the obligation of the state to provide, through exercise of its power and function, 'shelter' to every Indian is compellingly urgent. The acknowledgement in the two statements of National Housing Policy (January 1987 and March 1987) that 'housing' is a basic need, to which the Directive Principles summon state action, is indeed welcome. Equally welcome is the stress on 'housing' for the disadvantaged people, especially as this

5. See para 3.3 *supra*.

expression has been further concretized in para 4 of both formulations of policy as including : scheduled castes and tribes, economically weaker sections and low income groups, people in disaster-prone areas and "slum" and "squatter" settlements. However, this inclusive categorization makes no special reference to the distinctive housing needs of women, a look which ought to be remedied as the housing problem has a "gender" dimension to it.

4.2. What is disconcerting in the two policy statements is the striking change in the emphasis on objectives. Whereas para 2 of January 1987 statement commits itself to providing "every family to own an affordable shelter by the year 2000 A.D.", this vital objective is altogether eliminated in the March 1987 statement. If the time limit of thirteen years was considered unrealistic, the objective could have been modified to attainment of "shelter" for the most "disadvantaged" by the year 2001 A.D., with a phased programme of endowing everyone with "shelter".

4.3. Instead, the March 1987 statement has in its first statement of objective, encouragement of "investment in housing" with a view to "achieve a sustained growth of the overall housing stock". This reformulation indicates *no* schedule, let alone a time-bound programme, of any priority for state action. Nor is to be assumed that the growth of the rates of investment in the housing, to the extent co-related to the "growth of the overall national housing stock" will necessarily achieve the result of benefiting the *most* disadvantaged of all disadvantaged.

4.4. The Urbanization Commission, in the present submission, has a clear constitutional duty to indicate to the nation the importance of a schedule to attain the rights to shelter of all disadvantaged peoples in India. It is only when this constitutional objective is firmly enunciated that programmes of augmenting rate of investment and the national housing stock will achieve results in the direction of sheltering the disadvantaged. Any vaccillation on this aspect will, it is submitted, result in a conscious or otherwise betrayal of its constitutional obligations by the Urbanisation Commission.

4.5. Indeed, the Commission should consider the proposal to amend the constitution in ways which will crystallize the state's obligation in this regard. It should then be the task of policy instruments to seek to achieve the goals of policy formulation.

4.6. It is in considering a proposal for amendment to the Constitution that crucial policy choices become more crystallized in ways which *mere* statements on Housing Policy rarely do. Accordingly, even if the Commission is unwilling to propose an amendment to the Constitution, the exercise of doing so will endow it with superior capabilities for the second order task of national policy formulation.

4.7. How shall we operationalize the "right to shelter" in the Constitution in ways which will enable us to move to a result which will benefit the most disadvantaged? It is beyond realistic expectation that the Indian state will, or can, commit itself to the enunciation of a fundamental right entitling everyone to shelter, which courts can under Articles 32 and 226 routinely enforce by way of duties. If this is so, a multidimensional approach is needed.

4.8. We propose a series of discrete amendments both to Part III and Part IV of the Constitution, with a view to endow the disadvantaged.

4.9. *First,* we attend to a category of Indian people who are made shelterless by state developmental action. A large number of public projects, especially irrigation projects, but not only these, deprive the shelter set of the shelter they initially possessed. The displacement of people by public developmental projects is massive as well as notorious. Neither the existing laws—especially the Land Acquisition Act—nor the two Housing Policy Statements fully advert to this aspect. Cash compensation does not, in itself, ensure that the basic need for housing among the displaced will meet the new need for housing created by displacement; the 'public purpose' justifying the exercise of the eminent domain powers of the state does not extend to such rehabilitation, beyond monetary compensation, to the provision of an alternate adequate shelter.

4.10. In all such displacement, we witness a phenomenon of de-sheltering those already sheltered. Even if "legal", in the sense that existing laws permit such 'development', the state of affairs is clearly unconstitutional, and liable, sooner or later, to be so declared by the Supreme Court of India.

4.11. Accordingly, we propose, as a first amendment to the Constitution, an addition to Article 21 as follows :

> "Article 21-A : No person belonging to any weaker section of society as defined by law made by Parliament shall be deprived of housing or shelter enjoyed by him as a result or exercise of legislative or executive power of the state in the absence of the provision of a suitable adequate shelter by the State."

4.12. Such an entitlement will not defeat any developmental project. Rather, it will ensure, as well such projects ought to, that the costs of 'development' are not borne by the 'disadvantaged' people of India. Moreover, such an entitlement will enable an appropriate cost-benefit analyses of developmental projects, disabling pursuit of policies which, as a long-term cost, result in what we now know as the "problem" or "crisis" of "urbanisation".

4.13. *Second,* there is no reason why Indian citizens should not be given immunity from state inaction in the wake of 'natural' disasters. Both the 1987 statements of housing policy, rightly stress the need for housing for 'disaster-prone' people. Their plight calls for a logic of entitlement, not the logic of executive or state largest. Accordingly, we propose an additional Article 21-B as follows :

> "Article 21-B : No person belonging to a weaker section of society as defined by law made by Parliament, shall be, in the wake of a natural disaster or man-made catastrophe, be denied a right to adequate shelter by the state."

4.14. *Third,* among the shelterless there occur specific distress situations owing to inclement climatic conditions, of which "cold wave" deaths are inhumanely notorious. The provision of *rain besharas,* no matter what the quality of their comfort, are entirely at the subjective, and unbridled, discretion of the executive power of the state. There is no constitutional or democratic reason why this should be so. To prevent the macabre visitation of death and disability on the Indian impoverished, a command of the Constitution is absolutely imperative and this should take the formulation, as follows, of Article 21C :

> "Article 21 C : Every shelterless or homeless person has a fundamental right to shelter under inclement climatic conditions to claim provisional shelter under such conditions, whether or not specifically defined by law to be made by Parliament in the behalf."

4.15. *Fourth,* the State runs a whole variety of custodial institutions, including juvenile homes, Nari Niketans, centres for preventive detention and jails. As the proceedings in *Dr. Upendra Baxi* v. *State of U.P. & Ors.*[6] for example, reveal the institutional shelter provided to inmates lacks almost all constitutional regard for statutorily prescribed quality of life standards. The Mulla Committee on Jail Reforms has already made concrete recommendations related to right to adeqate shelter while in preventive or judicial custody. The conditions in Indian jails fall short of humane shelter in a variety of tragic ways, by now well documented in literature.[7]

4.16. When the State takes over the socially necessary responsibilities for custodial/preventive detention, it is imperative on it to provide immunity from deleterious or injurious shelter to people in custody. This obligation to provide shelter, consistent with institutional standards, is only inchoately defined by varying statutory regimes. The Supreme Court has begun to enunciate a regime of the minimal constitutional standards. The Government appointed commissions and committees have also reinforced these. There is no reason, in principle or policy, why these standards should not be made a part of fundamental entitlements. Accordingly, it is recommended to the Commission that it proposes the further addition to Article 21 as follows :

> "Article 21-D: No person shall be deprived when in custody, whether preventive or punitive, of the right to adequate shelter, or be exposed to unhygienic, insanitary or debilitating conditions of living while in custody."

4.17. None of these proposed constitutional amendments should lack multiparty consensus. None of these amendments will in any sense of that term unreasonably aggravate the problems of resources. Each one of the proposed amendments merely unfolds the norms of civilized governance implicit in the Indian Constitution. Constitutional amendments of this kind rather than statutory enunciation of these entitlements have the further advantage of overcoming the division of federal detail. What is more to the point, they compel minimal shelter commitments without which declarations of "housing policies" will remain pious gestures. For all these, and related reasons, I commend to the Commission these proposals.

4.18. Of course, in themselves these proposals but touch only the fringe of housing problem. Additional constitutional niches are necessary to empower the State to march further ahead in this direction. In this respect, it becomes necessary to consider further other related proposals for the amendment of the Constitution.

4.19. It is crucial that approaches to "housing policy" should be enunciated in Part IV of the Constitution. The Directive Principles, as noted earlier[8], do, of course, indicate broad orientations of State and social policy. But forty years of constitutional experience in the area of sheltering people now indicates the greater helplessness of more concrete, and specifically focussed, Directive Principles relating to 'shelter' and 'housing'.

4.20. Accordingly, we propose for the most earnest consideration of the Urbanization Commission an Additional Directive Principle provision by way of Article 41-A, as follows :

> "(i) The State shall make every necessary endeavour to ensure that every person

6. AIR 1987 SC 191.
7. U. Baxi, *The Crisis of the Indian Legal System* (1982).
8. See Sec. II *supra.*

shall be guaranteed the right to a place to live in security and dignity and in particular endeavour, within reasonable time, to ensure that this right is assured, beyond defeasibility, and as a matter of priority, to the following sections of the people :—

(a) the scheduled castes and scheduled tribes;

(b) married women in terms of a regime of community property;

(c) single, separated or divorced women;

(d) orphan, neglected or abandoned children;

(e) neglected elderly people without shelter adequate to the needs of advanced age;

(f) those exposed to, or suffering from, incurable physical or mental disability or disease;

(g) people designated, from time to time, as living below the 'poverty line' as determined by the Planning Commission and the Union of India.

(ii) In furtherance of the duty enjoined by this Article, Parliament shall consider every year the steps taken by the state towards the fulfilment of these obligations and shall by a resolution of both the Houses suggest programmes of action for the ensuing year, including policy measures to give effect to this Article by the Planning Commission of India and the Finance Commission to be appointed by the President under Article 280 of the Constitution.

(iii) It shall be the duty of the State to disseminate information concerning the progress of implementation of this Article in all the languages recognized by the Eighth Schedule to the Constitution.

(iv) All other agencies of the State under Article 36 shall endeavour to ensure in their operations the entitlements enunciated in this Article."

4.21. The foregoing proposal, self-explanatory as it is, has the advantage of directing in specific ways the formulation of planned policies on housing/shelter. It identifies concerned beneficiary constituencies in terms of national priorities it provides for specific mechanisms of converting proposed constitutional duties into programmes of State action. It structures, though in elementary ways, parliamentary invigilation and the right of the people to know.

D. THE 1987 HOUSING POLICIES, LEGISLATIVE RENEWAL AGENDA AND TASKS BEFORE THE COMMISSION.

5.1. Both the January and March 1987 Housing Policy declarations propose a substantially similar nine-point programme of legislative renewal. The programme of law-policy changes envisaged by those declarations of Policy is staggeringly vast. To the credit of the Commission, it Interim Report[10] already contains innovative approaches to some of those points. In this section, we highlight the magnitude of task of legislative policy renewal in the same order of priority devised by the Policy Statements.

5.2. *Rent Legislation :* The Policy recommends such review and amendment of rent control laws as would enhance *both* a "reasonable return on investment for the house-owners" and protection of tenants from "arbitrary increases in rent" and "against eviction".

5.3. The Commission, in its interim report[11] has rendered the following findings illustrative of "certain inherent defects which have had a most deleterious effect on rental housing". These are :

(a) "Totally controlled rents and absolute security of tenure have reduced the core of cities" and have also contributed to "insecurity of the quality of buildings" in which tenants reside.

(b) There is a "very substantial reduction in residential construction for rent" new accommodation is built for sale; especially since maintenance expenditure cannot be borne on the prevailing rental value.

(c) Rent law has been responsible, overall to restrict the "supply of rental housing".

(d) Rent law, particularly in achieving a fixity of rent, has distorted "rental market" and generated a "parallel economy" in the sense of non-refundable deposits (premia) or receipt of rent without due acknowledgement.

(e) Since rateable value of property taxes is tied to standard rent, "the municipal revenues are denied their just share, by way of property tax, of the true value of property".

(f) Rent laws have contributed to a State of affairs causing "substantial distortion in land use "especially because tenancy protection virtually prevents reconstruction of dilapidated structures located on prime land", the impossibility of relocating tenants inhabits a "strategy of urban renewal".

10. *Supra* n. 4

11. *Id.* at 26-27.

5.4. All these factors add to a substantial critique of the frameworks of operative rent laws. And each of these factors is striking at a *commensense level.* But at a scientific level there would be room for contention and dialogue because what the Commission achieves is an *impact analysis* of rent laws. Impact analysis of law on economic behaviour is a notoriously difficult enterprise.[12] Not that it is impossible to achieve a credible impact analysis. But the task of isolating the law as a casual factor entails control of plausible rival hypotheses.

5.5. For example, propositions *(e)* stipulates a corelation between cost of maintenance and over-protection of tenancy. But the need for extensive maintenance may also arise because of lack of stringent quality control over building materials, sharp practices by architects, engineers and contractors, the lapse of time since the building was constructed, the number of tenants using the entire premises and the number of persons living in a residential accommodation. All these, and related factors, may have a bearing on the poor maintenance of the building; and different policy approaches may be needed for each of these variables. It is doubtful that protection of security of tenants exclusively and in itself, and by itself, is the sole major cause of lack and aggravation, of the problem of maintenance.

5.6. Similarly, the distortions generated by parallel economy in "rental market" may be due to some aspects of operation of rent laws (point (d) above). But surely rent laws are not the only or even the most salient causative factor. Quite the contrary. Indeed, it is tenable to argue that most people in India become landlords only because there is a thriving "parallel economy" which offers them opportunities to exploit the land market. Most people who construct houses for rent do so with income which is undisclosed or underdisclosed, as the rush to declare income-tax during the end phase of voluntary tax disclosure schemes would immediately suggest. Perhaps, there does not exist a census of patterns of ownership of land and buildings in major cities of India, inclusive of family *benami* ownership: nor of state-financed residential units which are then converted into profitable rental housing. Such an examination would suggest that major factors other than rent laws assist and reinforce "parallel economy" distortions in rental market.

5.7. Furthermore, propositions *(e)* and *(f)* suggest weak and indeterminate correlations with rent laws. The rateable value of property tax can be delinked from standard rent by explicit empowerment in that behalf in municipal tax legislation. in ways which fully meet with the Supreme Court's standards concerning *(a)* fairness of use of discretionary power and *(b)* *prima facie* "reasonableness" of a tax measure, an area in which courts are generally wary of judicial review. Similarly, proposition *(f)* is extravagant, surely, when it attributes the inhibition of programmes of urban renewal arising out of impossibility of relocation of tenants in the process of "reconstruction of dilapidated structures on prime land." Surely, this "impossibility" has *not* effected a great deal the relocation of slumdwellers or pavement dwellers or squatters into distant settlement colonies. And surely more basic policy measures are needed than amendment of rent laws to achieve this purpose as the Commission itself, implicitly, realizes in its operative recommendation that prior to a cut-off date (January 1, 1987) fully protect *in all respects* the existing tenancies.

5.8. Similarly, the entire premise of advocacy of substantial deregulation of rental market is that it adversely affects the rate of investment in housing from the private sector. The correlation between rent control legislation and economic behaviour of private sector is any case notoriously difficult to establish. Even otherwise, available national projections do not suggest such a correlation. As the Seventh Plan itself recognizes the estimates made by the Central Statistical Organization (CSO) showed that "private sector investment in housing between 1974-75 and 1979-80 increased by about 62 per cent or at about 12 per cent per annum".[13] It further acknowledges that this growth rate will yield in the Seventh Plan period "an investment of around Rs. 29,000 crores". This does not mean that the rate of investment is adequate for the projected housing need of 16.2 million dwelling units during the Seventh Plan period. But this does mean that existing rent control laws do not have the magnitude of adverse impacts assigned to them by the Commission.

5.9. The intention of these observations is to illustrates the need for a more rigorous examination of the impact of rent laws on the housing situation. This is important because any law/policy change should not be based on mistaken assumptions. If it is, instead of solving 'problems' it would only turn out to aggravate them.

5.10. The recommendations in the interim Report urge, on the basis of the above mentioned "six" findings concerning the "deleterious" impact of rent laws, a virtual deregulation of non-residential and non-residential premises of 80 sq. meter plinth area and above w. e. f. 1st January 1987 leaving

12. U. Baxi, *Towards a Sociology of Indian Law* 45-65 (1986).

13. *Seventh Five Year Plan* 1985-90 Vol. II at 293 (1987).

the new lesser accommodation for residential areas to fixation of base rent as the "first agreed rent".

5.11. This approach is based on an assumption that deregulation will, in itself, redress all the problems casually attributable to the operation of rent taxes. But it is not at all self-evident that such a thorough-going deregulation will not lead to unfair and unconscionable rental contracts or more important to channelling of private housing investment to more favourable rental exploitation in non-residential buildings. Nor is it self-evident that low income housing initiatives will be plentiful just because the rigors of rent control laws are altogether relaxed or eliminated. We need a far more rigorous projection of costs and benefits in terms of postulated goals of augumenting and improving the national housing stock through such deregulation in order to appreciate such a major policy shift fully.

5.12. The Commission envisages that the state shall continue to provide adjudicatory services to landlords and tenants, even after the relation between them is to be wholly governed by mutual agreement. This is why quasi-judicial tribunals are recommended, with a hierarchy permitting one review, in addition to writ and supervisory jurisdiction of the High Court and the Supreme Court. These services will, of course, remain necessary for existing tenancies upto the cut-off point (January 1st, 1987). This is as it should be.

5.13. But for the existing tenancy litigation in so far as it affects low income groups some attention needs to be given to adequate legal services. The Legal Services Authorities Act, 1987, does not cater to this specific constituency of tenants. Similar need exists for low-income tenants even under the proposed deregulation. It is all the more important that adequate provision of legal services be made to equip the more disadvantaged classes of tenants, especially when massive deregulation is contemplated.

5.14. The costs of such provision should of course, be met partly out of the returns for the mediatory services provided by state adjudication. In other words, tenancy disputes, tenancies involving non-residential accommodation and residential one exceeding plinth area of 8059 meter should be provided on the basis of capacity of parties to pay for such services. This may be through specific fees, part of which may be channelled to costs of providing legal services to disadvantaged tenants, and part of which will, more or less, self-finance creation of new tribunals. The raising of revenue to meet the expenditure of tribunalization and legal services programmes follows from the 'logic' of deregulation. If it is no longer in public of social interest to regulate the rental market, there is no longer any specific justification for the state to provide specialized adjudicatory structures and services free of cost or rightly subsidized, to the relatively affluent at the cost of the absolutely disadvantaged.

(ii) Amendments to the Urban Land Ceiling Act (ULCA)

5.15. This major second item on the agenda of the Housing Policy relates to ways to amend the ULCA with a view to "promote housing activity" and mobilize more land and "other resources" for the housing of "economically weaker sections and the low and middle income groups."

5.16. As compared with the policy formulation on rent laws, the Commission's analysis of ULCA is sensitive. For example, it says :—

> **Whilst no direct co-relationship can be established between the enactment of the Act and the rise in land prices, the Commissions would like to categorically state that the Act has certainly not achieved the objective of preventing speculation and profiteering** (emphasis in original).[14]

5.17. In addition to a critique of ways in which legal powers of exemption under sections 20 and 21 have negatived the objective of the Act, the Commission indicates the basic flaw in its design. Unlike the agrarian land ceiling laws, the ULCA concretizes its prime objective as transfer of surplus urban land for "the multiplicity of ends which, in the opinion of the State, subserve the common good." The Act does not contemplate the retransfer of land thus acquired "almost automatically ..... to the urban landless". It is to introduce this objective in the ULCA that the Commission proposes a ten-point comprehensive amendment.

5.18. In paras 3.4 to 3.10 we have already emphasized the importance of a more integrated approach to design and drafting of these amendments. We reiterate these at this stage as we believe that in attention to adequate designing of amendments will once again lead to a critique and proposals of amendments to the Amended ULCA *all over again*.

5.19. But we must attend here to the overall logic of the amendment. And it is here that the ambiguity of the Commission's approach needs full attention. Thus, while the Commission, rightly, laments the failure

14. *Supra* n. 4 at 24.

of the ULCA to "almost automatically" transfer the land to the "urban landless"[15], its proposed amendments do not see directly to achieve this objective either. Rather, the ten change proposals are prefaced with the observation that what is "important..... is the proper utilization of land, rather than its ownership and title". It is "optional land utilization" rather than radical redistribution which animates the Commission's change proposals.

5.20. On this approach, owners of surplus land may continue to remain owners but given option either to build housing for the disadvantaged sections (within prescribed limit of 80 square metres of plinth area) or to transfer land to Cooperative Housing Societies. If within five years, land is not so utilized the Act will operate in all its vigour with the State acquiring the surplus land under Sections 10, 11 and 14 of the ULCA. In the period of five years, surplus would be liable to a cess which will finance the shelter fund. Heavy penalty—amounting to a hundred times the prescribed vacant land cess/tax — will be imposed on holders of land if they construct land in violation of "prescribed use or plinth area". The penalties will also be credited to the shelter fund.[16]

5.21. *Prima facie* this appears an attractively pragmatic policy package. It aims to promote urban housing for the disadvantaged by indirect set of incentives, especially for surplus-owners who comply with prescribed use of land. It is expected that this incentive will generate an "optimum" land utilization.

5.22. It is not clear why the Commission did not favour amendments to ULCA which would have transferred the ownership of surplus land to the State with the mandate of providing housing/shelter for the disadvantaged. This could have been ensured by a set of proposed amendments which would have plugged all the "loopholes" in the administration of the ULCA. For examples, the power to grant exemptions—which on its liberal exercise has resulted in section 20 and 21 exemptions of 43863.50 hectares of surplus land as against 14588.64 hectares actually acquired by the State—could be subjected to very stringent, and articulate, guidelines by a suitable amendment which would make exemption possible in the "rarest of rare cases".

5.23. Similarly, the creation of Shelter Fund and levying of cess/tax on lands declared surplus could have been inscribed on the present structure of ULCA. Even when the owners of land may resort to extensive litigation, as indeed they would under the present proposals, the cess/tax would be leviable from the decisional amount of declaring land as surplus.

5.24. There should also have been no difficulty, in policy or principle, to inscribe, as a paramount objective of ULCA, the dedication of all surplus land thus acquired to meet the housing/shelter needs of the urban impoverished.

5.25. In designing an alternative law/policy package, the Commission is obviously influenced by the possible ways in which the ULCA has been implemented so far. From an examination of these, the Commission has readily concluded that housing needs can best be served by giving the first option to owners of surplus lands to act in socially responsible ways.

5.26. But the Commission itself is not wholly sure that the five-year interregnum for private initiative by surplus-holders to enable them to meet public purposes and needs will, indeed, be wholly productive. For, it is envisaged that if surplus-owners are "unable to construct such dwellings" they may be "permitted to transfer land" to Cooperative Housing Societies for that purpose. It is only when either of those fails that the State steps in to acquire the surplus and redistribute it.

5.27. This raises a number of questions which need detailed attention. There are many ways in which a determined surplus-holder can prolong this interim period. For example :

- She may declare well towards the middle or end of the five-year period that she is unable to construct the dwelling,
- She may not take initiative in locating a cooperative housing society to whom the surplus land is to be transferred,
- She may contest the granting of such permission in various ways,
- She may decide well towards the end of five years period to begin construction, pleading a whole variety of factors preventing earlier compliance.

Additionally, she can contest determinations made by authorities of violations of prescribed use and plinth areas. She may even contest towards the middle or end of the five year period the validity of the very declaration of surplus land. Reliance on the wayward periods prescribed by the Indian Limitation Act, 1963, further subjected to condonation on the ground of "sufficient cause" may indeed make, on these issues, the intervening period of five years more prolix, if not a slice of eternity, than the seductive attractiveness of a five year period the presently proposed change offers on paper.

15. *Id.* at 22.

16. *Id.* at 25.

5.28. Assuming, however, that surplus landowners display a commendable sense of social responsibility and allow the State to take it over after the five year interregnum. What assurance then exists that the State will have acquired superior redistributive capabilities at the *end* of the period? Such capabilities have to be structured in the very text of the ULCA. The ten point agenda of amendment does not move significantly in this direction. Indeed, despite acknowledgement that the power of exemption has made a mockery of ULCA, there is no proposal which drastically restricts the exercise of this discretionary power. No time limits are prescribed for disposal of such application. No administrative duties, default in the performance of which may entail the liability of the officials, are contemplated. Nor is the prospect of administrative deviance through corruption addressed at all.

5.29. These details cannot be over looked in high-minded exercises of *policy-planning.*

5.30. Even otherwise, as a matter of first principle, why should vesting of urban surplus land, for dedication to the urban impoverished, not be a vital aspect of national housing policy? The mere fact that ULCA was not initially designed that way or that its administration was not effective do not suggest necessarily the notion that the best why to proceed is in the direction of interim (and as it may turn out ultimate) reprivatization of surplus land. For all these reasons, we recommend a reconsideration of the policy recommendations on ULCA contained in the Interim Report.

(iii) **Legal Measures Facilitating Housing Finance:**

5.31. The Housing Policy declaration in its legislative renewal agenda provides scope for a comprehensive examination of legal measures with a view to facilitating the growth of financial investment for housing.

5.32. Of the four recommendations in this direction—provision for reform of law of mortgages, provision for corporate development in housing, liberalisation of urban planning and development control legislation and legislation declaring housing to be an "industry"—the last is the most crucial one.

5.33. Paragraph 6.4 of the Housing Policy, recommends that, on priority basis, 'housing' be declared as an 'industry'. This will enable flow of "institutional finance and other facilities" to the public and private sectors to play "a more effective role in housing development". The nature and dimension of "institutional finance and other facilities" become elaborately clear from para 7 on housing finance, which envisages a model authority called National Housing Bank.

5.34. This proposal follows the enunciation in the Seventh Plan which identified the dimension of housing needs around construction of 16.2 million dwelling units. The Seventh Plan strategy addresses primarily the "promotional" role of the government in the area of urban housing and the "subsidizing" role in regard to "rural housing" especially under the Minimum Needs Programmes. For the Former, the promotional effort has three dimensions :

(a) improvement of slums;

(b) "direct provision of housing for the weaker sections of society"; and

(c) the "encouragement and support of housing finance institutions that promote channelling of private resource into housing in a constructive way".[17]

5.35. In contrast, the Section on "Legislation" in paragraph 6 focusses only on objective (c) above. Paragraph 11 on "informal sector housing" does not either observe priorities thus laid down for the promotional role of the State in urban housing or spell out emphatically the priority needs for rural housing.

5.36. The focus on institutional housing through legal measures proposed in the Housing Policy is thus not fully in keeping with priority objectives of the Seventh Plan. This policy ambivalence which results in relative neglect of priority areas (a) and (b), in para 5.35 above, needs redressal. These two areas need a more direct attention to legal measures not reflected in the Housing Policy.

5.37. In addition, even as regards the proposal that housing be declared an 'industry' the kind of legislation envisaged by Paragraph 6.4 of the Housing Policy is not fully consistent with constitutional perspectives. The reference to "*minimum* controls for ensuring planned development and fulfilment of *certain* social responsibilities and duties" creates an appearance of a suggestion that a *progressive* legislation is intended. But how does one operationalize "minimum" controls? and the reference to "certain social responsibilities and duties?" The latter are clearly articulated in Part IV of the Constitution; and in performance of the paramount duties under the relevant Directive Principles the extent of regulatory effort (or "controls") cannot be *minimum.* There is a not too subtle distinction between 'minimum' and 'optimal' control. Once again, the hidden logic of deregulation is operative here.

5.38. Policy indeterminacies of this order will only result in design of weak tentative and differential legislation. It is important, in

17. *Supra*, 13 at 295.

the present submission, to have more pertinent, and constitutionally legitimate, overall policy indications than those found in Paragraph 6.4.

5.39. Much the same needs to be stated to the anaemic reference to "an acceptable standard of environment" in Para 6.7 of the Housing Policy.

5.40. Paragraph 6.3 of the Housing Policy proposes amendment in relevant laws so as to "provide for a speedy process of foreclosure." A general overview of relevant provisions of Transfer of Property Act is provided in these materials.[18] Sections 66 to 77 of the Act elaborate the principal features of foreclosure process. A mortgage is defined by section 57 of the Act as a "transfer of an interest in specific immovable property" by the mortgaged "for the purposes of securing money advanced or to be advanced by way of loan, an existing future debt or performance of an engagement which may give rise to a pecuniary liability". Section 66 enunciates the rights of the mortgages where *there is no contract to the contrary* to foreclose the mortgage through court processes resulting in either a decree that the mortgagor shall be absolutely debarred of his right "to redeem the property" or that the "property be sold." The law in this area is quite technically complex and needs examination in the light of the 1976 Banking Laws Reform Committee Report on real security law.

5.41. Without going into reforms so far suggested, any proposal to amend the law with a view to provide *expeditious* proceedings must confront itself with the intransigent facts concerning delays' in judicial process, and the underlying reasons therefor.[19] Unless the entire law relating to mortgage was to be so transformed as to obviate the requirement of civil procedure and related adjectival laws, and existing judicial processes and structures refurnished by (*a*) investment in infrastructure of 'subordinate' and appellate judiciary and (*b*) manpower planning for judiciary, including timely appointment of justices, one may not realistically expect the kind of expedition here envisaged by the statement in the Housing Policy.

5.42. Clearly, in the meantime, there is no reason why, if this is not already done, public financial institutions may not make appropriate and adequate stipulations protecting their interests in equity and expedition in the deed of mortgage, as envisaged by laws relating to land development's mortgage.[19a]

5.43. Paragraph 6.6 concerning urban development loses much of its starkness when read with paragraph 16.2 of the Housing Policy. But a better integration between environmental concerns and urban planning policies is needed than thus indicated in any case, the legislative agenda here is quite incomplete without a detailed focus on considerations so comprehensively canvassed in the Seventh Plan. These in particular, related to :

(a) the "restoration of health" of "politically, administratively and financial weak" municipal bodies;

(b) reversion of "all obligatory functions" to municipalities;

(c) "structural reforms, improvement in general and financial administration and reform of tax system;"

(d) importing greater "vigour" to Environmental Improvement of Slums Programme (EIS);

(e) legal designing of centrally sponsored schemes of "Integrated Development of Small and Medium Towns" (IDSMT);

(f) provision of infrastructure facilities such as roads;

(g) creation of an Urban Development Infrastructure Authority to prevent, *inter-alia* "the high rate of incidence of death and disease" attributable largely to the "poor quality of water and sanitation facilities";

(h) concern with environmental pollution.[20]

5.43. It is astonishing that the National Housing Policy should have comprehensively failed to stress these salient aspects in its agenda of legislative renewal. The policy with its relative neglect of these aspects, and heavier emphasis on investment in housing in the private sector, has evoked a justifiable criticism that it overlooks the democratic and constitutional considerations animating the plan. The Urbanisation Commission should not seem, we urge, to favour *growth* without *equity*. It is imperative for the Commission, therefore, to advert comprehensively to these issues, even if they find no salience in the National Housing Policy.

CONCLUSION

6.1. In the present view, the Commission's mandate is to propose a package of policies and legislative designs which promote the achievement of the right of every Indian citizen to shelter, with a security and dignity. This constitutional mandate has already illuminated the proposals of the Seventh Plan. While the orientations of macro-policy planning indicated in the Plan are of prime importance, the task

18. See P. M. Baskhi, "An Analysis of the Transfer of Property and Registration Acts" *infra* at 292.

19. See *supra* n. 7.

19a. See *Banking Laws Reform Committee Report* at 114-116 (1976).

20. *Supra* n. 13 at 298-304.

of the Commission, in the present view, is to evolve :

— clearly formulated, and cogent, sectoral policies which will help accelerated attainment of the constitutional mandate

— articulate structures of law as a programme of credible social action for social change.

6.2. If the present submissions have at places been critical of the Commission's Interim Report and of the National Housing Policy declarations, the criticisms are intended to be constructive and to assist the Commission in tasks of policy and law renewal, as instrumentalities *par excellence* of attaining *equitable* urban development.

6.3. For better or worse, the Commission has a mandate which imposes a staggering agenda. It is inevitable that its tasks will be diverse as formidable. Selection of law/policy issues to which the Commission should give priority have, in the ultimate analysis, to be governed by criteria which are commensurate with the constitutional mandate, further operationalized by its Terms of Reference and the Interim Report. The criteria of exclusion/inclusion of aspects and issues concerning law and policy have to be, accordingly, clearly enunciated. This is no easy task. But escape from it is also not open.

6.4. Where all round urban development requires proposal of constitutional amendments, a reluctance—based on self-imposed restraints—will be constitutionally unconscionable where the Seventh Plan directs attention to issues such as more efficient designing of local self-governance institutions or to protection and promotion of environment, it is similarly not open, in the present submission, for the Commission to balk at the prospect of travelling 'unsafe' distance. If the tasks before the Commission entail making proposals for remodelling legislative—formulation process, retooling legislative instruments, and refurnishing judicial institutions, it would be arbitrary, even if expedient for the Commission to stop short of addressing these issues.

6.5. The present Note is animated by a judiciously activist approach to national tasks legitimately pressing on the Commission. Our labours will be amply rewarded if the Commission while being reinforced with awareness of the magnitude of its tasks is also enhanced in its capabilities to fashion solutions to problems here highlighted.


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Urbanisation and Law : an overview and agenda

P. M. Bakshi


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URBANISATION AND LAW : AN OVERVIEW AND AGENDA

I. INTRODUCTION

1.1. The impact of urbanisation on the law and the legal system, and on certain legal institutions, is a matter which has not yet received attention on an intensive scale. No doubt, at some stage or other, every country which has undergone urbanisation and faced the consequential social and economic problems has found it necessary to tackle those problems by legal as well as by extra-legal measures. This has happened in India also. Legal measures adopted or contemplated from time to time do deal with problems generated by urbanisation and the evils attendant thereon. They can, with some effort, be traced in the content, pattern and approach of several portions of Indian law. However, with the exception of enactments specifically dealing with town planning, such measures have been sporadic and scattered. They have been sporadic, in the sense that they came to be adopted only when occasion arose. A problem which arose at a particular time and in a limited area having been dealt with, further thinking was not devoted to the subject. Again, such measures have been scattered, in the sense that they would not be found collected in one particular enactment or chapter of a Code. The area of law in which such measures appear would not be prominent or easily visible. In any case, the fact that the measure was adopted to tackle a problem resulting from urbanisation would not stand out conspicuously. The non-legal student of urban affairs, or possibly, even a person fairly well-versed in the law, may not find it easy to locate all such legal measures very readily.

1.2. It would appear that our approach to the subject now needs a change. Acceleration in the rate of urbanisation, and the intensity of its impact on our living, have been so vast and extensive, that the time has come for having a comprehensive look at the legal measures adopted in the past or are needed for the future, in order to tackle urbanisation. What has so far been a sporadic process now needs to be systematic and planned. What has so far been lying scattered requires now to be collected and made comprehensive. What has, in the past, been fragmented should now be replaced by a total approach.

1.3. It may be mentioned that we are fast progressing towards urbanisation. According to the 1981 census, 23 per cent of India lives in cities.[1] The percentage will be much higher, when the next census is taken. The number of cities having a population of more than a million is bound to increase with every census.[2] Hence the need for concentrated thinking on the subject.

1.4. It is obvious that a comprehensive, integrated and total approach is likely to involve several areas of the law. There is, in the first place, the general legal system, which may suffer the impact of urbanisation in regard to its mechanism and institutions. Then, urbanisation may affect the economic resources of the community, and also create a stress on natural resources. As a matter of economic justice, the situation may involve legal measures. Urbanisation creates strain in other respects also, particularly, in the movement of goods and human beings. The regulation of such movement needs the intervention of the law in some form or other.

1.5. Apart from its impact on these tangibles of society, the process of urbanisation may possibly create a strain on the mental make-up of the community and of individuals. Urban life tends to be fast, less relaxed, more specialised, and more crowded. Invisibly, it leads to stress. Due to such stresses, certain types of class conflicts tend to be more acute in highly urbanised areas, particularly because of the nature of the distribution of property or economic activity and the complexity of inter-relationships in urban areas.

1.6. The tensions, frictions and conflicts, mentioned above by way of illustration, in their turn, tend to increase the quantity of crime in the big cities, thereby necessitating a heavier burden on the criminal law and its apparatus. The magnitude recurring frequency and urgency of such problems (when they require official intervention through law or otherwise) increase the magnitude of activities of the bureaucracy. They enhance the scope and impact of bureaucratic powers whether, functioning through the apparatus of the criminal law or in some other manner.

1.7. The time has come for focussing attention on these problems, concerning the law as likely to be affected by urbanisation. The immediate effort should be to deal with the areas that need to receive urgent attention in the Indian context. The remaining paragraphs present a broad scheme, intended to highlight the areas where legal problems will arise and to indicate the measures that will possibly be needed. No one can anticipate, in advance, details of the needed legislation on various matters. But it can still be worthwhile suggesting avenues for concrete legislative or other legal action.

1. *Cf.* M.N. Buch, *Planning an Indian City* (Vikas 1987), chapter 1.
2. Om Kumar, *Services and Sites for Urban Housing in India* 55 (1983).

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By way of concrete illustration, it may be mentioned that increased urbanisation is bound to necessitate a review of such enactments as the Motor Vehicles Act, the Water Pollution Act, the Air Pollution Act, the Codes of procedures, matrimonial laws, rent control legislation and even laws relating to prostitution. All these enactments relate to areas where urban living, with the individual tensions and class conflicts that it tends to generate, creates a noticeable impact, and, further, it is an impact that necessitates legislative action whether at the level of the Union legislature, State legislatures or local authorities. Apart from attention to such specific areas, it may be worthwhile exploring an important question which pervades the entire theme. The question can be formulated in this manner—

(a) Should we not have, at hand, a formula which will supply the criterion for identifying highly urbanised areas ?

(b) Once the formula as at (a) above is evolved as per general acceptance, can we not have some device (say, in the Interpretation Act) weaving such formula into the web of the law ?

II. URBANISATION AND THE GENERAL LEGAL SYSTEM

2.1. The need for making special provisions in the legal system regarding big cities is not totally unknown to the Indian law. There exist, in the Indian statute book, several special provisions applicable to Presidency towns (or, in some cases, metropolitan cities). The law has, thus, made a differentiation between big cities and small cities, in some respects.

No doubt, this differentiation was historically linked with the fact that there were High Courts vested with original ordinary civil jurisdiction, (in the Presidency towns) which jurisdiction was not enjoyed by other High Courts. However, it also had the advantage of dealing, on a special level, with the legal problems of an urban and commercialised community, with refined and cosmopolitan inhabitants and with legal disputes of a sophisticated nature.

2.2. Important examples of special provisions which were enacted, keeping in view the above special requirements of big cities, can be enumerated, by way of illustration :—

(a) *Civil Courts.*—There have been established, in some of the big cities, City Civil Courts (also exercising jurisdiction as Courts of Session through their criminal counterparts), under the authority of special enactments which provide for, the constitution of such courts. One point of the distinction between these courts and other civil courts is, that they are outside the normal hierarchy of civil courts—i.e. District Courts and subordinate courts—to be found in other areas. In so far as a City Civil Court has unlimited pecuniary jurisdiction, it may be said to resemble the Court of District Judge. However, the local jurisdiction of a City Civil Court is confined to a highly urbanised area. Moreover, a City Civil Court has no courts subordinate to it and generally does not have any appellate or revisional jurisdiction. The presiding officers of the court have thus saved the trouble and botheration of inspection duties or appellate work. This is precisely a feature likely to possess the greatest utility, being appropriate where the area of the court's jurisdiction is a highly urbanised one, with a constant capacity for growth and with a scope for complex legal disputes arising in places with a concentration of population.

(b) *Criminal Courts.*—For highly urbanised areas, in respect whereof a City Civil Court has been constituted, as mentioned above, that court generally also functions as a Court of Session for the purposes of the Code of Criminal Procedure, 1973. Besides this, Courts of Metropolitan Magistrate, which can be created under the Code of Criminal Procedure, 1973, in respect of metropolitan areas, have also been given a special status. For example Metropolitan Magistrates exercise the highest magisterial powers. Moreover, they cannot be transferred to other places, unlike Magistrates of first class appointed for non-metropolitan areas.

(c) *Courts of Small Causes.*—This differentiation can be perceived even with regard to Courts of Small Causes. The enactment relating to Courts of Small Causes for the Presidency towns is separate from the enactment applicable to Courts of Small Causes in other places. The former is the Presidency Small Cause Courts Act, 1882 while the latter is the Provincial Small Cause Courts Act, 1887. Courts of Small Causes constituted under the former have a higher jurisdiction than corresponding courts for the mofussil. Some may think that the jurisdiction of these courts is of a technical and limited character. However, it should be pointed out that Courts of Small Causes possess the valuable potential of being transformed into "Courts of Small Claims", particularly suitable for adjudicating upon small commercial disputes and consumer grievances of a justiciable character.[3]

(d) *Insolvency Courts.*—For the Presidency towns, there is a separate enactment dealing with insolvency law, in contrast with the enactment dealing with insolvency law as applicable to other places. The formal is the Presidency Towns Insolvency Act, 1909 while the latter is the Provincial Insolvency Act, 1920. The insolvency court in Presidency towns has more powers than insolvency courts for other areas.

(e) *Commissioner of Police.*—In regard to the three Presidency towns, the system of police administration has, for a long time, been

3. See also para 2.5 (iii), *infra*.

different from the system of police administration elsewhere. For the Presidency towns, an officer designated as the "Commissioner of Police" has been functioning—an institution that has now been extended to some other areas also. The need for creating and maintaining this office seems to have arisen mainly because the problems of highly urbanised areas (such as Presidency towns) in regard to the maintenance of law and order and allied matters could conceivably be different from the problems of other areas. Special problems needed more powers, vested in officers of a higher calibre. To mention only one power conferred on the Commissioner of Police by way of example, orders on the various matters contemplated by section 144 of the Code of Criminal Procedure (a section dealing, *inter alia,* with orders needed to maintain public order and tranquility and to remove public nuisances) can be passed by Commissioners of Police in Presidency towns (and in certain other big cities). In contrast, at other places, the police must approach the District Magistrate or other competent Magistrates for the purpose.

(f) *Coroners.*—Taking note of the fact that the pattern of life and the nature and volume of traffic in big cities, might lead to proportionately higher cases of unnatural or accidental deaths the British rulers provided for the institution of Coroners for the Presidency towns,—an institution which still continues to function in Bombay. This is not the place for going into details and history of the institution of Coroners. But it appears that in order to deal with the problems of such deaths in highly urbanised areas, some such institution can be usefully introduced or reintroduced, even in cities other than Presidency towns. The Coroner, once so appointed for an urban area, can then also be entrusted with the function of holding inquests into "dowry deaths". And, of course, the Coroner will also be expected to look into deaths occurring in police custody—a phenomenon which has the habit of making its appearance in big cities with an irregular frequency. It may be mentioned that the Coroner is an independent and expert person and his verdicts can, in general, inspire more confidence than the reports of other officers. In the absence of Coroners, investigations or inquests into suspicious deaths are held by the police or by the Executive Magistrate, who may not always inspire public confidence.

What has been narrated above is a gist of the provisions that are contained in the legal system as applicable to Presidency towns. These illustrate the legislative determination to deal with such areas on a special footing in the light of their special needs.

2.3. To some extent, the Central and State legislatures have realised the need to have special judicial, legal or other institutions for big cities, besides presidency towns. Delhi is one example of such a big city. Besides having a High Court with ordinary original civil jurisdiction, Delhi has also adopted some of the other peculiar legal institutions which were prevalent in Presidency towns. However, the adoption has not been total, as will be evident from what follows. One can analyse the position by stating that at present, Delhi has, or does not have, a special judicial apparatus as compared and contrasted with other cities on a few matters. The position is as under :—

(a) Delhi does not, as yet, have a City Civil Court for its metropolitan area. Suits which are below the pecuniary limits of the original civil jurisdiction of the Delhi High Court go to the District Judge or other competent Civil Judge, Delhi.

(b) Delhi has Metropolitan Magistrates, appointed under the Code of Criminal Procedure, the city having been declared to be a metropolitan area for the purposes of the Code.

(c) The Presidency Small Causes Courts Act does not extend to Delhi.

(d) The Presidency Towns Insolvency Act also does not extend to Delhi.

(e) Delhi has a Commissioner of Police, functioning under the Delhi Police Act, 1967, with special powers and status.

(f) Delhi does not have any Coroner for holding inquests into suspicious deaths and the Coroners Act, 1871 does not extend to it.

In this sense, the metropolitan status of the city of Delhi has not yet been fully achieved, but certain developments have taken place in that direction.

2.4. Having stated in brief the present position, it may be worthwhile suggesting an agenda for the future. Review of urbanisation in India, carried out periodically and systematically, will, of course, cover all aspects—social and economic. But it should also include legal aspects. A planned periodical review of urbanisation and of its impact upon the legal system will naturally be expected to look into the deficiencies with regard to places like Delhi, on the points mentioned above. Besides this, such a review will also have to consider how far special machinery of the nature mentioned in (a) to (f) above should be adopted for other areas which are already highly urbanised, or are in the process of rapid and intensive urbanisation.

2.5. It may also be convenient to consider, with regard to particular urban areas, whether such urbanised areas should have—

(i) a separate Family Court constituted under the Family Courts Act, 1984;

(ii) a separate Tribunal for adjudication of motor vehicles accidents claims; and

(iii) separate courts on other matters, wherever needed. [For example, a separate Consumer Grievances Redress[4] Forum under the Consumer Protection Act, 1986 may be needed for metropolitan areas.]

III. URBANISATION AS CREATING A STRESS ON ECONOMIC RESOURCES

3.1. One of the direct consequences of urbanisation is the effect which it has, on the quality and quantity of the resources available to the residents of the particular urban area. The question of its adverse impact on quality may be left to be dealt with, in the discussion about pollution.[5] The question of its adverse impact on the quantity of resources, particularly man-made resources, may be dealt with at this stage.

3.2. Illustratively, it can be said that basic resources needed are food, clothing and shelter. The economic resources available in an urban area to meet these basic and bare needs are limited. If it is a highly urbanised area, the density of population may render these resources scarce. For some persons or sections of the population, these resources may be even non-existent. "Shelter" primarily means land. Availability of land in limited quantity raises questions of control over the price paid for its use, which (in modern terms) connotes rent control. The non-availability of land to certain sections of the population leads to the creation of slums. This necessitates a mechanism for slum clearance and improvement.

3.3. Apart from land, commodities are needed for food. Their limited or scarce availability may lead to poverty, but this is not a phenomenon peculiar to urban areas. What is peculiar to urban areas is the demand for certain articles of consumption, such as milk, which may become periodically scarce. This phenomenon necessitates appropriate monitoring of civil supplies through statutory control over essential commodities.

3.4. Besides this demand for basic necessities of life, urban living makes the population aim towards a sophisticated and a high standard of living. This psychological urge leads to at least two peculiar tendencies namely :—

(i) a desire for more and more quantity of a particular item of consumption; and

(ii) a desire for newer and newer items of consumption.

The second type of urge may be actuated by the high standard of living adopted by certain sections of the urban population—which other sections desire to emulate even though they may not be able to afford it. The items additionally so demanded by the urban population may be tangible goods or intangible items (say entertainment at cinema halls) or more refined activities (such as, cultural programmes and other shows).

3.5. Not all these peculiarities of urban living require State intervention, and not all these peculiarities, even where they require State intervention, can be tackled by legislation. But some of them do require legislation or—an aspect which is often overlooked—a constant review of legislation relevant to the various urban needs. To go into the details of all such laws would mean a study too specialised and elaborate to be covered within the dimensions of the present project. However, it appears to be proper to highlight the need for evolving a machinery for reviewing the impact of such needs on law.

IV. URBANISATION AND POLLUTION: THE LEGAL PROBLEM

4.1. One of the necessary evils of urbanisation is water, air and noise pollution. This phenomenon can be checked to some extent (though not totally), by appropriate legal action. The manner in which, and the extent to which, such action has been taken so far in India, and what more needs to be done, are matters which are relevant to urbanisation. There has been considerable legislative and judicial activity in the sphere of environmental law, and some aspects have received heightened attention due to the occurrence of some major disasters.

4.2. Some aspects showing the link between urbanisation and pollution and how they can affect the legal scene, are worth mentioning. Urbanisation, by its impact on the quality and quantity of natural resources and energy sources, immediately makes such questions relevant. Inevitably, urbanisation creates a strain on natural resources. This strain is felt in two of its aspects. In the first place, increased consumption of water and other natural resources and increased exploitation of sources of energy, leads to shortage of those resources. Secondly, there is the question of pollution of those resources. The second question relates to damage to the environment, including, in particular, water pollution, air pollution and noise pollution.

4.3. The first aspect of the strain on resources mentioned above is a quantitative one. It is not concerned with the purity of the re-

4. See also para 2.2(c), *supra*.

5. See sec. IV *infra*.

sources, but with the resources themselves. The problem of regulating the very consumption of natural resources, particularly water, has not yet been tackled in India by legislation. Probably, the need for such legislation has not been felt. However, it is possible that the imposition of such restrictions by law may become necessary, in the not so distant future. It will then become desirable to create, by law, an authority which will have the requisite power of controlling the consumption of water. At this stage, it is not possible to anticipate what precisely will be the shape and content of the relevant legislation. It seems though, that the legal system could be called upon to deal with variant kinds of questions, arising due to scarcity of water. There could be disputes between the owners of neighbouring lands, with regard to the utilisation of the available water resources. If a legislation imposing penalties for excessive consumption of water is enacted, disputes centering around these offences could arise in the sphere of criminal law. Questions may also arise in the sphere of constitutional law, if two highly urbanised areas, situated in different States but contiguous to each other, have occasion to lay claims on the same source of water.

4.4. Apart from shortage of resources, there is the qualitative aspect—the aspect of pollution, mentioned above. It is not commonly realised that in India, both the Codes of procedure have fairly specific and concrete provisions which can be pressed into service to combat urgent or intensive cases of actual or threatened damage to the environment. The legal labels under which the provisions appear may be antiquated and archaic. But that is not very material. What matters is the statutory provision and the legal remedy available under that provision. S. 91 of the Code of Civil Procedure, is a provision under which legal proceedings can be taken for checking any wrong of a public nature,[6] and this would undoubtedly cover wrongful conduct impairing the environment.

4.5. Besides a proceeding in the competent civil court under the above provision, there also exists a speedy procedure in criminal law for urgent cases. A citizen can, under S. 133 of the Code of Criminal Procedure 1973 initiate a proceeding before the competent Magistrate for the removal or elimination of public nuisances. It should be pointed out that the concept of public nuisances is wide enough to embrace, *inter alia,* all harmful activities which impair health, spread serious disease or cause discomfort to those in the vicinity.

4.6. India now has a host of legislative measures dealing with various aspects of pollution, the most recent enactment being the Environment (Protection) Act, 1986. This Act has been brought into force on 19th November, 1986, and certain rules have already been framed thereunder. However, it is one thing to frame a law or rules on any subject, and quite another thing *(i)* to enforce the law and the rules effectively; *(ii)* to tackle ambiguities and omissions that may be discovered in the law in the course of its working, and *(iii)* to deal with legal disputes arising out of such law. Much has been spoken and written about environmental courts. Without going into details of the structure, pattern, composition, jurisdiction and procedure of such courts, one can still venture to make the observation that the more urbanised an area, the more urgent and intensive will be the need to create environment courts for it. This is not the place to give detailed suggestions on the subject, though it will not be possible to avoid this question for long.

V. URBANISATION AND TRANSPORT

5.1. A certain amount of strain on transport and traffic is an inevitable consequence of urbanisation. In particular, urbanisation brings in an increase in the number of motor vehicles as defined in the Motor Vehicles Act, 1939. This is apart from problems of noise pollution and air pollution resulting from such increase. So far as the impact of such increase on law and legal system is concerned, a few salient features of such impact deserve mention. In the first place, increased number of motor vehicles necessitates increased attention to the enforcement of legislation relating to motor vehicles. This necessitates a sophisticated, well-equipped traffic force. Secondly, when accidents caused by motor vehicles occur, there is the question of compensation and the connected question of forum and procedure for determining the claims for such compensation. Such claims are adjudicated by the tribunal constituted for the purpose under the Motor Vehicles Act. Past experience shows that adequate number of tribunals are not being constituted for urban areas. As a matter of legal remedy, the situation can be remedied by taking out a writ in public interest litigation. But it is proper that the need for resort to writs in such matters should be eliminated and government should itself pay attention to this problem. This is one matter to which the monitoring cell, recommended elsewhere in this study, should devote continuous attention.[7]

5.2. On the criminal side attention should also be paid to the question of traffic offences

6. The proceedings to be instituted for the purpose do not require Government sanction or the consent of the Advocate General. After the amendment made in the Code of Civil Procedure at the instance of the Law Commission of India, all that is necessary is that leave of the court should be obtained.

7. Para 1(c), *infra.*

whose number inevitably increases with increase in the number of motor vehicles on the road.

Deaths caused by motor vehicle accidents almost inevitably lead to a prosecution under section 304A of the Indian Penal Code. The section, however, is not really intended for every accidental death. It presupposes rashness or negligence. There seems to prevail a misconception that every case of death caused by the operation of a motor vehicle must necessarily fall within the ambit of the criminal law, which is far from the true legal position. Some efforts are necessary to remove such misconceptions.[8]

Even when the case falls within section 304A of the Penal Code, there should be a provision in the procedural law for compounding the offence with the permission of the court. The same suggestion applies to offences under section 29 of the Penal Code. This is a section often resorted to by the police, where an injury short of death has resulted from the driving of a motor vehicle.

5.3. Although, the matter of technical violations has received some attention in the recent past, much more concentrated attention is required on the subject. The sorry spectacle of honest and respectable persons being required to attend the courts of Magistrates for totally technical violations of the law definitely presents an unpleasant feature, undermining respect for law.

5.4. In the context of claims of compensation for accidents (including accidents caused by motor vehicles) it is desirable to impress upon those who are in charge of passing claims on the basis of insurance policies, the need to evolve a rational and reasoned approach towards the settlement of such claims. Every year, the law reports in India bring to light litigation in which the claim made by or on behalf of the victim of an accident caused by a motor vehicle is resisted by the insurer on grounds which are insufficient in law and, at times, flimsy. This is a first-rate example of social injustice coming to be perpetrated not by reason of any defect in the law, but by reason of an unhealthy bureaucratic approach towards a well-meaning law. This is an indirect, if not a direct, consequence of urbanisation.[9]

VI. URBANISATION AS CREATING CLASS CONFLICTS

6.1. It is commonplace that certain peculiar types of class conflicts arise in urban living. To some extent, such conflicts are due to the scarcity of economic resources, which is a phenomenon peculiar to urban living.[10] This, for example, is the cause for landlord-tenant conflicts. In a few respects, the conflicts are due to the strain on the psyche of the individuals and the community in urban areas, resultant from diversity and concentration of population.

6.2. Two familiar examples of class conflicts, more or less peculiar to urban areas, are the conflicts between landlords and tenants and the conflicts between employers and employees. Legislation of considerable complexity and magnitude does exist in India, for resolving both kinds of conflicts. Here again, the laws applicable for resolving such conflicts would be of a specialised character, not appropriate for the present study. But some kind of reviewing machinery or monitoring apparatus[11] would be needed for looking after the progressive enactment and implementation of such legislation and for reviewing periodically the question how far modification of the legislation is needed, in the context of the following types of trends :—

(i) the entry of an area, hitherto regarded as a rural area, into the stream of urban areas;[12]

(ii) the entry of an area, hitherto regarded as an ordinary urban area, into the stream of metropolitan areas;

(iii) the entry of an area, already regarded as a metropolitan area, into the category of what can be called a "super-metropolitan area"—say, with a population exceeding ten million; and

(iv) other developments caused by urbanisation which have had, or which are likely to have, an impact on legislation.

6.3. Incidentally, in this chapter and other chapters of the study, where the need for review of "legislation" on a particular matter has been indicated, the suggestion should be taken as covering subordinate legislation also. From the practical point of view, such "sub-laws" are much more important than the parent law. Because sub-laws are not subjected to parliamentary discussion (except in the rare cases where they are discussed in Parliament after they being laid before the Houses), their form and content does not attract much political attention. Even scholastic writing focussed on sub-legislation is comparatively rare in India, at least in the legal field. It is in very specialised journals, mainly concerned with particular segments of business or taxation, that the actual content of subordinate

8. Some administrative device could be evolved for screening such cases at a high level before instituting prosecution.

9. See also S.IX, *infra*.

10. See S.III, *supra*.

11. Para 9.1(b), *infra*.

12. See also para 7.4, *infra*.

legislation finds a detailed discussion. But the practical importance of sub-laws should not be lost sight of and they should be kept under constant review. This necessitates the further suggestion that on important matters, sub-laws of relevance to urban living (in all its aspects) should be kept available at reasonable price to the public.

VII. CRIME AND CRIMINAL LAW

7.1. By now, it has come to be recognised that urbanisation leads to increase in the volume of crime. This naturally renders more frequent the intervention of criminal law. In part, this may be due to the fact that urban living leads to more intensive tensions. To some extent, it is also due to the fact that the concentration of population in a large number within a small area requires a greater police force for checking crimes than can be made available. Thirdly, the pattern of urban living reduces opportunities for personal involvement of the community in the investigation and detection of crime. Fourthly, in a metropolitan city, travelling by its inhabitants over long distances by the city transport for work or pleasure leads to the situation that the inhabitants are carried to or through areas where they are not known, thereby leading to a loss of identity and generating a sense of insecurity. These factors, singly or taken together, explain the peculiar emergence of certain types of crimes in big cities. Pick-pocketing and eve teasing are appropriate examples.

7.2. Although it is easy to locate the factors that lead to increased criminality, it does not follow that the remedy for meeting the problems created by those factors necessarily lies in the provisions of the substantive or procedural law. To some extent, of course, it may become necessary to attend to specific problems arising out of urbanisation. In India, so far as eve teasing is concerned, this very process took place when, while revising the Code of Criminal Procedure, eve teasing was made a cognizable offence. This is an amendment which seems to have worked well. This instance is cited here only to show how the emergence of a specific type of crime in an abnormal proportion may need the attention of the law. More often, however, problems created by urbanisation in respect of pattern of crime, may not need an amendment of the law, but may require an augmentation of the resources of the criminal justice system. It is this aspect which should need concentrated and recurring attention. It is common experience that the number of criminal courts (particularly, Magistrates) functioning at a given time in metropolitan cities, is not adequate to deal with the volume of crime.

7.3. This renders it desirable that the Ministry concerned should keep a close and continuous watch over—

(a) the volume of criminal litigation in metropolitan cities;

(b) the number of criminal courts functioning in metropolitan cities;

(c) the position regarding growth or decline of arrears in such courts; and

(d) any noticeable increase in the rate of crimes of particular type in metropolitan areas.

This exercise should be done as an independent one, and not merely as a part of the general and routine collection and analysis of cases in criminal courts. At present, so far as is known, separate and special attention is not being adequately given to the above aspects of urban crime.

7.4. It has already been pointed out[13] that the Code of Criminal Procedure does take note of the special needs of urban areas, in so far as the Code contemplates that for such areas there shall be Metropolitan Magistrates. This institution needs to be utilised systematically when an area not yet labelled as a metropolitan area for the purposes of the Code, enters that category[14] as a result of periodical increase in its population.

VIII. URBANISATION AND THE BUREAUCRACY

8.1. The very content of the preceding chapters would indicate that urbanisation necessitates more laws,[15] and more sub-laws[16] and thus proliferate bureaucratic machinery. This increase in the quantum and diversity of bureaucratic work, in an urban setting, postulates acquisition of greater powers by the bureaucracy. Lawyers and the lay public are aware that increasing resort to the writ jurisdiction of the higher courts in India has brought into being a fairly complicated and profuse set of rules in the domain of administrative law. These rules regulate the exercise of discretion by the bureaucracy, whether the functions with which the bureaucracy comes to be invested are adjudicative or non-adjudicative. It follows that ordinary administrative training does not suffice to ensure that those invested with such functions would manage to keep abreast of the legal developments and to steer

13. Para 2.2(b), *supra*.

14. See also para 6.2, *supra*.

15. Chapters 3 to 7, *supra*.

16. Chapter 8, *supra*.

clear of obvious illegalities. The only practicable way of ensuring this with reasonable success is to create and maintain some machinery for imparting to the senior bureaucrats the necessary knowledge and for refreshing their knowledge periodically. It is with this important objective in mind that the following concrete suggestions are offered.

8.2. In the first place, there is need for a systematic course of instruction in administrative law for the senior members of the bureaucracy. Such courses have been already started in several departments, either in their own training schools or by some other mode. But the facilities available in this regard should be reviewed, so as to ensure that those facilities are available in all States and to officers of all departments. At first sight, it may appear that this is a mere theoretical suggestion, but the spate of litigation against State agencies which one now witnesses in almost every High Court (and even in the lower courts) is a reminder that there is a very dire need for such training facilities. Many government and semi-government officers are still under the impression that simple rules of natural justice (such as, giving an opportunity of hearing to a citizen before passing an adverse order) are mere superfluous technicalities, forgetting that they are at the heart of democracy.

8.3. The second suggestion that needs to be made is that a manual (of, say, not more than ten printed pages at the maximum) should be made available to all senior officers. The manual may contain the gist of important and commonly applicable safeguards flowing from administrative law. These safeguards, not often found in the special laws with which departmental officers are ordinarily familiar, need to be impressed upon them. Such a manual need not be technical or too detailed. About ten paragraphs of text, with illustrations drawn from hypothetical situations or from reported decisions, should suffice. Where necessary, the basic material (which would be common to all departments) can be supplemented by a summary of important rulings (on administrative law) on points of special interest to a particular department. It is important to emphasise that officers of local authorities should not be left out of this exposure.

8.4. On some matters, there is also need for a liberal approach by the bureaucracy towards claims of citizens.[17]

IX. SUGGESTIONS

9.1. By way of conclusion, it may be suggested that for tackling the problem of law as influenced by urbanisation and for securing a systematic, continuous, comprehensive and co-ordinated review of the law and its implementation, there is need to create within the appropriate Ministry a cell which will undertake the following principal functions :—

(a) review of the laws of special interest to big cities, in the light of field data;[18]

(b) monitoring the implementation of the relevant laws as for the time being in force;[19]

(c) making fresh proposals on the subject.

9.2. This is apart from the suggestions made in some of the preceding chapters for specific amendments in the law (or for creating particular types of machinery on specific matters).

17. Para 5.4, *supra*.

18. See para 2.4 and 2.5, *supra*.

19. See para 5.1(ii), *supra*, and para 5.2, *supra*.

Urban laws and administrative process

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8—258 M. of Urban Dev./ND/88


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URBAN LAWS AND ADMINISTRATIVE PROCESS

I. INTRODUCTION

1.1. The various urban laws confer vast discretionary powers on the administration to effectuate the policies and programmes envisaged under them. Consequently the structuring and exercise of discretionary powers under these laws is a matter of important concern for urban policy planners. The courts have maintained a strict scrutiny over the exercise of discretionary powers. An analysis of judicial decisions is made with a view to showing the various grounds on the basis of which the courts have reviewed the conferment and exercise of administrative discretion. These are :

(i) Malafide exercise of power;

(ii) Exercise of power for improper purposes;

(iii) Exercise of power on irrelevant consisideration;

(iv) Exercise of power to be reasonable, non-discriminatory and non-arbitrary;

(v) Exercise of power with due care and proper application of mind;

(vi) Application of the principle of promissory estoppel.

1.2. Under the different laws regulating urban planning with its wide ramifications, individual rights are being adjudicated. The courts, therefore, have insisted on the applications of the rules of natural justice which embody the concept of fairness. The judicial aim is not just to balance the administrative efficiency and fairness but to integrate the value of efficiency into the value of fairness. This is necessary to evolve an administrative ethos more responsive to people's rights. In general, the principles of natural justice have three basic requirements : first, before a person's rights are restricted or taken away, he must have adequate notice and fair opportunity of making objections or representations. Second, he must have his objections or representations heard and decided by an unbiased and impartial authority. Third, he is entitled to a decision supported by reasons, in other words, a speaking order. However, the extent of notice, the adequacy of opportunity and the nature of hearing and the adequacy of a reasoned decision depend on the circumstances of each case.

1.3. Under the Land Acquisition Act, 1894, the central and state governments have been given vast powers to compulsorily acquire land for public purpose. The states have further power to acquire land under their respective land acquisition, slum clearance, town planning, improvement and development legislations. The administrative process prescribed under them is almost similar posing identical problems of judicial review by the courts.

1.4. Under the Urban Land (Ceiling and Regulation) Act, 1976 land in excess of the prescribed ceiling can be acquired by the competent authority in accordance with the prescribed procedure. It has also power to exempt any land in excess of the ceiling limit.

1.5. The state legislations constituting numerous improvement trusts, housing boards, development authorities and corporations for town planning, slum clearance and housing schemes have been vested with vast powers to acquire land, remove slums and encroachments, demolish unauthorised constructions, promote housing schemes, construct and dispose of housing sites and ready-built houses and flats. While exercising their powers, these authorities, as instrumentalities of the State, are subject to the same standards and norms of fairness, justice and reasonableness as the State itself.

1.6. The problems of judicial review presented before the courts in matters of conferment and exercise of powers under the above legislations has almost been similar and the courts have propounded and applied generally the same broad principles of judicial review. These principles broadly stated are : violation of the principles of natural justice, doctrine of promissory estoppel, abuse of discretionary power on grounds such as mala fides, improper or collateral exercise of power, exercise of power on extraneous considerations, ignoring relevant considerations, on arbitrariness, unreasonableness, discrimination non-application of mind, acting under dictation, delegation, etc.

II. MALA FIDES

2.1 The exercise of powers *mala fide* means bad faith, dishonest intention or corrupt motive. *Mala fide* exercise of power has been considered to be abuse of power and the doctrine of *ultra vires* has been applied in such cases. The use of power for a purpose other than the one for which the power is conferred is *mala fide* use of power. Likewise, when an order is made for a purpose other than that which finds place in the order it amounts to *mala fide* exercise of power. In all such cases, the exercise of power is considered bad in law. The allegation of *mala fides* must not be vague but must be made with sufficient

particulars to convince the court. The burden of proving *mala fides* lies on the person making the allegation because if the order is regular on its face, there is a general presumption that the administration had exercised its power in good faith and in the interest of the general public. Ordinarily, the person against whom *mala fides* are alleged must be made a party and that person himself must come forward to rebut the allegations. It is, however, not necessary that any particular officer was responsible for the impugned action where the validity of the action taken by a government was challenged as *mala fide* as it may not be known to a private person as too what matters were considered and placed before the final authority and who acted on behalf of the government in passing the order. The vague allegations of *mala fides*, however, will not be enough to dislodge the burden resting on the individual who makes the allegation though what is required is not a proof to the bilt. These principles of *mala fides* have been applied by the Supreme Court and High Courts in a number of cases, particularly in land acquisition.

2.2. Under the land acquisition legislation, it is at the discretion of the government to decide whether, and if so, which particular land in how much area is to be acquired. But if the discretion is exercised *mala fide*, the decision would be quashed by a court. Thus in *State of Punjab* v. *Gurdial Singh*[1] for the purpose of building a new mandi, a site was chosen by the Site Selection Board and New Mandi Control Board. Way back in 1962, the then Chief Minister of Punjab, Partap Singh Kairon laid the foundation-stone of the *mandi* at that place and a few poles were erected. Notification under section 4 and declaration under section 6 of the Land Acquisition Act, 1894 were issued in 1969. But in the next year, the proceedings were denotified and in 1971, the lands belonging to respondents 1-21 were notified. The denotified land belonged to Mr. X who was a person with considerable political influence. The Punjab & Haryana High Court quashed the proceedings on the ground of *mala fides*. After a long interval, the state again sought to acquire the same land belonging to the respondents by invoking emergency power under section 17 which was again quashed by the High Court on *mala fide* grounds. The Supreme Court dismissed the appeal of the state also on the same ground. In this case, the petitioners had alleged political rivalry about which details were given with sufficient details. X never contradicted the allegations by filing an affidavit nor was he a member of any one of the boards which had selected the disputed sites. The allegations were denied by a person who himself was not a member of the boards and had no personal knowledge of the facts of the dispute. He had derived knowledge only from the official records which was not accepted by the court. The court held that the allegations of *mala fides* had not been rebutted and, therefore, they were proved and the action was quashed.

2.3. This case should not be taken to be an authority for the proposition that the government cannot change the site for purposes of acquisition but then it should be done in accordance with prescribed legal procedure. If after a notification under section 4 and a declaration under section 6, the government feels genuine difficulties in acquiring the lands in question, the allegations of *mala fides* cannot be sustained. Thus, in *Special Land Acquisition Officer* v. *M/s. Godrej and Boyce*[2] twenty years after publication of a notification and declaration, the state goverment refused to acquire land on the ground that it had been encroached by slums so as to render it worthless for any project. The Supreme Court refused to accept the plea of *mala fides* against the government.

2.4. The land acquisition proceedings were quashed on *mala fide* grounds in *Collector (District Magistrate) Allahabad* v. *Raja Ram*[3] in the following fact-situation. The Allahabad Municipal Board had given a big plot of land in 1953 to Hindi Sahitya Sammelan Prayag for setting up a museum which was not used for over a quarter of a century. An adjoining plot was purchased by the respondent to build a sound-proof air conditioned cinema theatre. The Sammelan was wholly opposed to the construction of the theatre near its campus and therefore, when the petitioner applied for a certificate of approval under rule 3 read with Rule 7(2) of the U.P. Cinematograph Rules, 1951 for construction of the theatre, the Sammelan authorities raised peaceful as well as violent protests and raised objections before the authorities against giving of approval. Overruling the objections, the District Magistrate, the licensing authority granted the requisite certificate. The Sammelan sent letters to various authorities for the cancellation of the certificate but did not succeed. Then it wrote to the state government for acquisition of land. Ultimately, in 1974, a notification under section 4(1) of the Land Acquisition Act was issued for the acquisition of the said land of the respondent for public purpose, viz., for extension of Hindi Sangrahalaya of Hindi Sahitya Sammelan Prayag. The notification was challenged by the respondent, *inter alia*, on the ground that the land was being acquired on *mala fide* grounds. The court noted that the land already in the possession of the Sammelan was lying unused for a very long time. The Sammelan had not succeeded in

1. A.I.R. 1980 S.C. 319.
2. Judgements Today (1987)4 S.C. 218.
3. A.I.R. 1985 S.C. 1622.

getting the certificate issued in respondent's favour cancelled despite its best efforts. The court, therefore, held that the need for land for Sangrahalaya was a figment of imagination conjured up to provide an ostensible purpose for acquisition. The Sammelan had already enough land for its use and the land in question was not being acquired for any of the objects of the Sammelan. The purpose was actuated by a desire not to have a cinema theatre in its vicinity. The Sammelan itself was intending to construct its own *natyashala* for staging dramatic performances and a *rangmanch* for performing dances. The court further held[4] :

> Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated. If the power to acquire land is to be exercised for an extraneous, irrelevant or non-germane consideration, the acquiring authority can be charged with legal *mala-fides*. In such a situation there is no question of any personal ill-will or motive.

One significant aspect of this case is that the respondent had not impleaded the Sammelan as a party in the writ petition nor was it impleaded as such even in appeal before the Supreme Court. Ordinarily, therefore, the Sammelan had no right to be heard in the court and the court could not have considered its view point. The Supreme Court, however ignored this aspect of the matter and allowed the Sammelan to advance its arguments. The acquisition proceedings were ultimately quashed on several grounds including *mala fide* exercise of power.

2.5. The decision in *Gurdial Singh* case was, however, distinguished by the Kerala High Court in *Thomas John* v. *R.D.O. Chengannur*[5]. In this case, the government had initiated proceedings for requisition of land which was in the possession of tenants. The tenants challenged the proceedings on the ground that proceedings were initiated by the government at the instance of the landlord on *mala fide* grounds. The court, while rejecting the contention and distinguishing *Gurdial Singh* case, held that the *mala fides* of the landlord were to be distinguished from the action of the land acquisition authorities against whom there was no allegation of *mala fides*. The petitioners had not contended that the authorities had dropped the proposal to acquire any other land and a new site was selected under the pressure of some other persons. In view of this, the court refused to quash the proceedings on *mala fide* grounds.

2.6. The abuse of discretionary power on *mala fide* grounds had been subject matter of judicial review not only in respect of land acquisition proceedings but also in a case where a building constructed after permission was sought to be demolished on *mala fide* grounds. Thus in *Express Newspapers Pvt. Ltd.* v. *Union of India*,[6] the petitioner had started the construction of a building on two plots of land taken by it on lease from the Union of India after getting permission of the Union Minister for Works and Housing with an increased FAR of 360 and a double basement. Subsequently, two notices were served on it. One was by the Zonal Engineer (Building), Municipal Corporation of Delhi, to show cause why the action of demolition of the building should not be done under sections 343 and 344 of the Delhi Municipal Corporation Act, 1957 for having started unauthorised construction contrary to the Delhi Master Plan, Zonal regulations and municipal bye-laws. The other notice was served by the Engineer Officer, Land and Development Office, New Delhi, purporting to be on behalf of the lessor, Union of India, to show cause why the lessor should not re-enter upon and take possession of the land on the ground that certain clauses of the lease-deed had been violated. The petitioner contended that the construction was started after getting the required permission and there was no violation of the terms of lease. *Mala fides* was attributed to then Lt. Governor of Delhi who was bent upon bringing about the stoppage of the publication of the Indian Express newspaper published by the petitioner which has consistently been critical of the governmental policies. The petitioner cited several facts to show the involvement of the Lt. Governor. It was further contended that the power was being exercised not for the purpose for which it was conferred but with ulterior motives. It never committed violation of the terms of the lease-deed or any plan, regulation, or bye-law. In his affidavit, the Lt. Governor did not specifically deny the allegation of motives. There was a bare denial with the assertion that the facts were not relevant. Under the circumstances, the court held that the allegation of *mala fides* was proved. The relevancy or unrelevancy of facts was not for the parties to decide but a matter for the court to decide. The two notices were therefore quashed.

III. ARBITRARINESS, UNREASONABLENESS AND DISCRIMINATION

3.1. Article 14 guarantees to every person equality before law and equal protection of laws within the territory of India. It ensures fairness, justice and reasonableness in all state actions, administrative, legislative or judicial. It strikes at arbitrariness of all kinds. The salutary principles of equality, non-arbitrariness, fairness, non-discrimination and reasonableness have been applied in case of urban laws and development.

4. *Id.* at 1634.
5. A.I.R. 1984 Ker. 239, see also *Elgin Properties* v. *State of West Bengal*, A.I.R. 1983 Cal. 61.
6. A.I.R. 1986 S.C. 876.

3.2. When land can be acquired by the state for a particular purpose under two or more statutes, it is for the executive authorities to decide under which statute land should be acquired. Thus, it was held in *Nandeshwar Prasad* v. *U. P. Government*[7] by the Supreme Court that the fact that lands could be acquired for a scheme under the Kanpur Urban Development Act, 1945, did not prevent the government from acquiring lands for the same purpose under the Land Acquisition Act. Despite this, the question arises whether the government can at its discretion choose one of the two statutes at its sweet will to acquire land when those contain separate procedure and different provisions in respect of calculation and payment of compensation. In *P. Vajravelu Mudaliar* v. *Spl. Dy. Collector*,[8] the court struck down land Acquisition (Madras) Amendment Act, 1961, for violating article 14 since two laws were in force for acquisition of land without any reasonable classification; one under the Land Acquisition Act for public purpose generally and the other the Madras Amendment Act under which land was to be acquired for housing purposes. The court found that this classification was based merely on the purpose of acquisition which was not reasonable. This case was distinguished by the Supreme Court in *State of Gujarat* v. *Shantilal*[9] in which it was held that sections 53 and 67 of the Bombay Town Planning Act, 1955 did not violate article 14 as the method of determining compensation in respect of lands which were subject to town planning scheme was prescribed under that Act and there planning scheme was prescribed under that Act and there was no option to acquire the land under the Land Acquisition Act or under the Town Planning Act.

This decision was followed in *State of Maharashtra* v. *Basantibai*.[10] The validity of section 44(3) and (4) of the Maharashtra Housing and Development Act, 1977 was challenged on the basis that it provided a different method of determining compensation payable in respect of lands situated within the municipal limits from the one under the Land Acquisition Act which provided the method of determining compensation in respect of rural lands. The owner in a municipal area was placed in a less advantageous position than the owner in a rural area which amounted to discrimination. The Supreme Court held that the land in municipal area enjoyed certain advantages which were not available in the case of land in rural areas. The potentialities of land in municipal area were more than those in case of rural areas. Under the legislation, the state government could not treat one piece of land in a municipal area in one way and another piece in that area in a different way. All lands in the municipal area were to be valued in a similar manner under the Maharashtra Act and all lands in the rural areas were to be valued in a similar way under the Land Acquisition Act. Such a classification did not violate article 14.

3.3. The decision in *Nagpur Improvement Trust* v. *Vithal Rao*[11] is a significant judicial pronouncement on the subject of discriminatory method of payment of compensation for land acquisition under article 14. The court conceded that the state could make a reasonable classification for the purpose of legislation but it must be founded on intelligible differentia having a rational relation with the object sought to be achieved by the legislation in question. The object must be lawful and not discriminatory. The appellant prepared a housing scheme which was approved by the state government under the Nagpur improvement Trust Act, 1936. Thereafter, land acquisition proceedings were initiated and the amount of compensation was fixed by the land acquisition officer in respect of land which was occupied by the respondent as a tenent. The validity of the Act was challenged, *inter alia*, on the ground that it was violative of article 14 in as much as it empowered the acquisition of land at prices lower than those which would have been payable if the land were acquired under the Land Acquisition Act. The court noted that under the Improvement Trust Act compensation was paid not according to market value of the land as permissible under the Land Acquisition Act but according to the market value of the use to which land was put on the date of acquisition. Thus, if a land was being used for agricultural purposes, even though it had a potential value as a building site, the potential value of that land was to be ignored. Thus, the actual amount of compensation would be much less for actual use than its potential value. Moreover, the owner of land was not entitled to 15% solatium under the Improvement Trust Act to which he is entitled under the Land Acquisition Act if land was acquired under that Act. The court also noted that the land acquired for the trust was in any case acquisition by the state itself and therefore, the choice of machinery under one of the two statutes also vested with the state government itself. It was held that the object of legislation under both cases was compulsory acquisition of land for public purposes. The land owners were not concerned with the purpose for which land was actually being acquired from them. They stood on the same footing and therefore, could

7. A.I.R. 1964 S.C. 1217.

8. A.I.R. 1965 S.C. 1017; see also *Balammal* v. *State of Madras*, A.I.R. 1968 S.C. 1425; *P.C. Goswami* v. *Collector of Darrang*, A.I.R. 1982 S.C. 1214.

9. A.I.R. 1969 S.C. 634.

10. A.I.R. 1986 S.C. 1466.

11. A.I.R. 1973 S.C. 689. This case was followed in *Nagpur Improvement Trust* v. *Ganesh*, A.I.R. 1973 S.C. 689 and *Sardarmal Lalwani* v. *State of U.P.*, A.I.R. 1973 S.C. 1383.

not be given different treatment in payment of compensation. The state cannot formulate different principles of compensation on the basis that the owner was old or young, healthy or ill, tall or short or whether the owner was an advocate or a politician. Likewise, the state cannot discriminate in payment of compensation on the ground that land was being acquired for one purpose or another. A classification based on public purpose was not permissible under article 14 for the purpose of determining compensation unless the owner of the land himself was the beneficiary of the housing scheme. Likewise, no classification could be made on the basis of the authority acquiring the land. Recently, Assam High Court in *Collector of Kamrup v. Anandi Debi*[12] declared as invalid a provision of the Assam Land (Requisition and Acquisition) Act, 1948 which had barred payment of solatium which the land owner would have been entitled had his land been acquired under the Land Acquisition Act. The Land owner was held entitled to solatium despite the bar.

3.4. In *State of Kerala* v. *T. M. Peter*[13] the Supreme Court had held that prescribing two different procedures under separate legislations cannot by itself be held to be discriminatory. However, where the government was the repository of two powers, that is, power of requisition as well as acquisition qua the same property and if the purpose could be achieved equally by "one which causes lesser inconvenience and damge to the citizen concerned unless the repository of both the powers suffers from any insurmountable disability, user of one which is disadvantageous to the citizen without exploiting the use of the other would be bad not on the ground that the Government has no power but on the ground that it will be a misuse of power in law.[14]" Likewise when the state government initiated proceedings for acquisition of land under the Land Acquisition Act for the construction of a dam but dropped the proceedings and then started the proceedings for acquisition of surplus land under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961, the action of the government was considered by the court to be misuse of power and therefore invalid.[15] The *Chandra Bansi Singh* v. *State of Bihar*,[16] the Supreme Court found violation of article 14 in a land acquisition matter where a large tract of land belonging to several persons was notified for acquisition for the purpose of construction of houses and allotment to persons belonging to low and middle income groups, but after six years the land belonging to a particular family was released from acquisition by the government by way of pure favouritism. The court upheld the original notification for acquisition of land under section 4(1) of the Land Acquisition Act.

3.5. The reservation of houses made by the New Okhla Industrial Development Authority (NOIDA) constituted under the U.P. Industrial Area Development Act, 1976 was challenged on the ground of discrimination and arbitariness in *I. L. Dhingra* v. *State of U.P.*[17] The reservation of houses in favour of political sufferers and the employees of central government, public undertakings and international organistions was quashed under article 14 but reservation in favour of persons whose lands had been acquired, entrepreneurs of NOIDA, their employees and the employees of NOIDA as also in favour of the principal financiers—HUDCO —was upheld by the court.

3.6. While conferring discretionary power, the courts have emphasised that adequate guidelines must be provided for the exercise of power by the delegate. If unguided and uncanalised power had been conferred on an administrative authority, it would be arbitrary. The existence of a corrective machinery by way of appeal or revision against the order is one of the safeguards against arbitrary exercise of power but if such machinery was not provided, it will not necessarily mean that the conferment of power is arbitrary. If other safeguards exist, the court may ignore the non-existence of corrective machinery. Thus section 54 of the Bombay Town Planning Act, 1955 read with rule 27 framed thereunder confers power on the local authority to evict occupants of lands, *inter alia*, by summary procedure. The Act and rules do not contain any provision for appeal/revision against an eviction order. The validity of the Act was upheld in *M/s.. Babubhai & Co.* v. *State of Gujarat*.[18] The court pointed out that mere absence of corrective machinery would not make the power unreasonable. While exercising the power, the authority will have regard to several factors, such as on whom power is conferred, hierachical status of the officer, the nature of power—exercise of power on the subjective satisfaction of the authority or exercise of power objectively by reference to some existing facts or tests, quasi-judicial power requiring the observance of the principles of natural justice. All these factors are to be considered in the light of the scheme of the Act and its purpose. The

12. A.I.R. 1987 Gau. 13.

13. A.I.R. 1980 S.C. 1438. See also *Jagannath* v. *State* , A.I.R. 1986 Bom. 241.

14. *Jiwani Kumar* v. *First Land Acquisition Collector* A.I.R. 1984 S.C. 1707. This case was recently followed in *State* v *Narendra Dairy Farms (P) Ltd.*, A.I.R. 1987 Mad. 161.

15. *State* v. *Narendra Dairy Farms (P.) Ltd., ibid.*

16. A.I.R. 1964 S.C. 1767.

17. A.I.R. 1987 S.C. 1262.

18. A.I.R. 1985 S.C. 613.

summary eviction procedure was to be used against those who were not entitled to use the lands. The power was conferred on a local authority which was presumed to be a highly responsible body. The power was to be exercised by reference to the final scheme and after observing the principles of natural justice. If, however, despite these safeguards, the power was exercised *malafide* or for extraneous or irrelevant considerations, the order would be subject to judicial review by the courts. This decision was followed in *P. A. Shah* v. *State of Gujarat*,[19] in which the court further rejected the contention that the procedure prescribed under the above Act was discriminatory because if the land Acquisition Act had been applied, the appellants would have got the benefit of the machinery provided under that Act.

3.7. It is significant to point out that when discretionary power is conferred on the executive authority, there is no presumption that it would be abused. Accordingly the court upheld the validity of section 64(a) of the U.P. Town Improvement Act, 1919, as extended to Delhi.[20] It has been held that the power granted to revoke or modify permission already granted for the development of land for housing given to the Municipal Commissioner under the Maharashtra Regional and Town Planning Act, 1966 was not unguided since the power was to be exercised when it was expedient to do so having regard to the development plan prepared or under preparation. The power was to be exercised after hearing the person likely to be adversely affected by the order.[21]

3.8. The recent tendency to arbitrarily increase the cost of construction of houses and flats by housing boards and authorities has been quashed by the courts. Thus, in *Sadhana Agrawal* v. *Indore Development Authority*,[22] the cost of construction of residential flats under the Regulations for Disposal of Houses, Flats, Buildings and other Structures, 1984 framed under the M. P. Nagar Tatha Gram Nivesh Adhiniyam, 1973, was increased by more than 100 per cent of the original cost. The court quashed the price fixed on the ground of arbitrariness. Likewise, in *Ajai Pal Singh* v. *Bareilly Development Authority*,[23] enhancement in the cost of flats by 100 per cent and increasing the monthly instalments by more than 50 per cent of the original amount was likewise qushed by the court which emphasised that the authority must establish that the action was not arbitrary.

3.9. The exercise of power by the Bombay Municipal Corporation to refuse to renew grant hawking licences to pavement hawkers was upheld as a reasonable restriction on the rights of hawkers in *Bombay Hawkers' Union* v. *Bombay Municipal Corporation*.[24] The hawkers were carrying on their trade of hawking their wares in Greater Bombay standing or squatting on public streets causing serious impediments to the free movement of pedestrians and vehicular traffic. The petitioners contended that they had fundamental right to carry on their trade, business and calling under article 19(1)(g) of the Constitution and the respondent was arbitrarily refusing to grant/renew their hawking licences which resulted in the removal of the petitioners along with their goods from the places of their business. The court repelled the contention on the ground that no citizen had a right to carry on trade so as to cause nuisance, annoyance or inconvenience to the other members of the general public. The streets were meant for use by the general public and not for carrying on trade by a private individual. The restriction was, therefore held to be reasonable.

3.10. The validity of most of the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 was upheld under article 14 in *Bhim Singhji* v. *Union of India*.[25] It has recently been held by the Andhra Pradesh High Court that the power given to competent authority under section 20(1) of the above Act to grant exemption to a person to hold land in excess of ceiling provided therein was not an arbitrary provision. The authority is expected to exercise the power of exemption in public interest or in the interest of land owner and further the power is to be exercised after hearing the applicant.[26]

IV. SUBJECTIVE SATISFACTION

4.1. When the government or its agencies are vested with power to decide on their subjective satisfaction, they are required to do so not on subjective factors but on objective considerations. Section 3(1) of the Andhra Pradesh Slum Improvement (Acquisition of land) Act, 1956 provides that when the government "are satisfied that any area is or may be a source of danger to the public health, safety or convenience of its neighbourhood by reason of the area being low lying, insanitary, squalid or otherwise, they may by notification in the A. P. Gazette declare such area to be a slum." The

19. A.I.R. 1986 S.C. 468.

20. *Kishan Das* v. *D.D.A.*, A.I.R. 1964 Punj. 384.

21. *Digambar* v. *Pune Municipal Corpn.*, A.I.R. 1987 Bom. 297. Some other cases relating to arbitrariness are : *K. Shakunthala* v. *A.P. Housing Board Gruhakalpa, Hyderbad*, A.I.R. 1986 A.P. 251; *P.G. Viswanathan* v. *Govt. of Tamil Nadu*, A.I.R. 1986 Mad. 146.

22. A.I.R. 1986 M.P. 86.

23. A.I.R. 1986 All. 362.

24. A.I.R. 1985 S.C. 1206.

25. A.I.R. 1981 S.C. 234.

26. *M/s. India Cable Co. Ltd.*, v. *Govt. of A.P.*, A.I.R. 1987 A.P. 28.

Andhra Pradesh High Court held that the government must examine whether these objective tests were satisfied before declaring an area as slum.[27] Section 103 of the Punjab Town Improvement Trust Act, 1922, empowers the state government to dissolve an improvement trust (a) where all sanctioned schemes have been executed (b) where such schemes have not been completed but have been substantially executed thus rendering the continuance of the trust unnecessary in the opinion of the government and (c) where, in the opinion of the state government, it is expedient that the trust should cease to exist. In *Jagdish Rai* v. *State of Punjab*,[28] the petitioners challenged the dissolution of 21 trusts by a notification on *mala fide* grounds and violation of the principles of natural justice. They contended that various development and improvement schemes were at different stages of execution and untimely dissolution of the trusts had halted them. The government pleaded that the action was taken as a matter of policy on consideration of all the materials. The court held that the grounds provided under section 103 were either factual or based on subjective satisfaction of the government that it was expedient to order the dissolution. Those had nothing to do with any kind of misconduct, abuse of power, corruption or incompetence of the chairman or members of the trusts. The ground of 'expediency' was wide. It was an independent, extensive and distinct power which was in no way circumscribed by the limitations of the other two grounds. The court, therefore, did not deem it fit to interfere with the impugned action of the government.

4.2. The question of "public purpose" for acquisition of land is to be decided by the government on their subjective satisfaction and the courts generally do not interfere with that decision unless the power has been misused or *prima facie* no public purpose is involved in the case. Thus in *Arora* v. *State of U.P.*[29] the court refused to quash the land acquisition on the ground that it was being done for public purpose as decided by the state government. However, the land acquisition in *Collector (District Magistrate), Allahabad* v. *Raja Ram*[30] was quashed by the Supreme Court as no purpose was involved in that case and the land was being acquired with ulterior motives. It has recently been held that allotment of surplus land acquired under the Urban Land (Ceiling and Regulation) Act, 1976 for sick textile undertakings was for common good and the same was valid.[31]

4.3. The satisfaction about 'urgency' for acquisition of land was challenged in some significant cases. The inviting and consideration of objections under section 5-A of the Land Acquisition Act may be ignored if a notification under section 17(1) was issued in respect of waste or arable land which was urgently to be acquired. The burden of proving urgency and existence of waste or arable land lay on the government, in *Narayan* v. *State of Maharashtra*,[32] the land was being acquired for industrial and residential use. *Prime facie* such action did not call for immediate possession of land. Such schemes take a long time to materialise. The subjective satisfaction of the commissioner, was, therefore, not sustainable. Likewise, in *Dora Phalauli* v. *State of Punjab*[33] the notification of the collector issued under section 17(1) was quashed on the ground that the statutory conditions had not been fulfilled. However, merely because there has been delay in taking action after issuing notification under that provision may not be a ground to strike down the notification. If the officials entrusted with the task were negligent or tardy, the acquisition could not be quashed in all cases.[34] Recently in State of *U.P.* v. *Pista Devi*[35] the notification issued under section 17(1) dispensing with enquiry under section 5A was upheld despite some delay in the proceedings.

V. COLOURABLE EXERCISE OF POWER

5.1. If under the colour of power conferred for one purpose, the authority intends to achieve something also not authorised, the action would be quashed by the court on the ground of colourable exercise of power. With reference to land acquisition for a public purpose, the Supreme Court in *Somavanti* v. *State of Punjab*,[36] held that if it appears that what the government was satisfied about was not a public purpose but a private purpose or no purpose at all, the action of the government would be colourable as not being relatable to the power conferred upon it by the Land Acquisition Act and its declaration of public purpose would be a nullity. The cases on *mala fides* are clearly applicable

27. *Co-operative Housing Society, C.E.* v. *Commissioner, Hyderabad Municipal Corpn.*, A.I.R. 1983 A.P. 277.

28. A.I.R. 1983 P. & H. 33.

29. A.I.R. 1964 S.C. 1230. See also *V.A.P.M. Committee* v. *Vyara Nagar Panchayat*, A.I.R. 1985 Guj. 204; *Chief Commissioner, Delhi Administration*, v. *S. Dhanna Singh* A.I.R. 1987 S.C. 835.

30. A.I.R. 1985 S.C. 1622.

31. *Ambaram Nathuram Purani* v. *State of Gujarat*, A.I.R. 1987 Guj. 199.

32. A.I.R. 1977 S.C. 183.

33. A.I.R. 1979 S.C. 1594.

34. *Deepak Pahwa* v. *Lt. Governor, Delhi*, A.I.R. 1984, S.C. 1721 in which *Kasireddy Papaiah* v. *Govt. of A.P.*, A.I.R. 1975 A.P. 269 was referred with approval.

35. A.I.R. 1986 S.C. 2025.

36. A.I.R. 1963 S.C. 151.

in such a situation. Successive notifications for the exercise of the same land under the Land Acquisition Act cannot by itself be considered to be a colourable exercise of power. Thus, in *Ghansham Dass Goyal* v. *State of Haryana*[37] the court held that the validity of each notification was to be judged independently. Even when a notification was quashed, there was nothing preventing the govt. from issuing for the government to issue a fresh notification. The issuing of such a notification could not be termed as colourable exercise of power. In *Collector (District Magistrate) Allahabad* v. *Raja Ram,*[38] the court quashed the land acquisition on the ground that the land was not being acquired for any public purpose but to serve the interest of Hindi Sahitya Sammelan, Prayag who did not want a cinema theatre in their vicinity which was proposed to be started by the respondent. In *Elgin-Properties* v. *State of West Bengal,*[39] however, the court did not quash the order of requisition passed by the respondent under the West Bengal Premises Regulation and Control (Temporary Provisions) Act, 1947. The petitioner had pleaded that prior to the passing of the impugned order, it had secured an eviction order against Caxton & Co. and the requisition order was passed for the benefit of the company and its employees. The order was, therefore, aimed at frustrating the eviction order. The court negatived the argument on the ground that the respondent had followed the normal prescribed procedure in passing the order and had applied its mind to the case and therefore the order was valid.

VI. RELEVANT AND IRRELEVANT CONSIDERATIONS

6.1. It is well settled that an action taken ignoring relevant considerations or by taking into account irrelevant considerations would vitiate it. It has been held that potentiality of land was a relevant consideration for calculating compensation to be paid to the owners of lands acquired by the government.[40] In *R. L. Arora* v. *State of U.P.*[41] the court found that the satisfaction of the government to acquire land for a private company for the construction of a textile machinery parts factory was based on irrelevant consideration. Under section 40 of the Land Acquisition Act, the consent for acquisition for a company could be given only when the government was satisfied that such acquisition was needed for the construction of a work which was likely to prove useful to the public. The court held that the consent was not based on relevant considerations. The Act was subsequently amended for acquisition of land for a company.

VII. ULTRA VIRES AND JURISDICTIONAL ERRORS

7.1. Relaying on *Dora Phalauli* v. *State of Punjab*[42] the Rajasthan High Court quashed a government notification issued under the Rajasthan Land Acquisition Act, 1953 as being *ultra vires* the Act. The Act provided that a notification under section 17(1) could be issued by the government dispensing with enquiry under section 5A only when two conditions were fulfilled : namely, that the case of urgency and that the land proposed to be acquired was a waste or arable land. If any of these conditions is not fulfilled, the notification would be invalid. The court quashed the notification as it did not indicate whether the land in question fell under waste or arable category.[43]

Section 18(1) of the Rajasthan Land Acquisition Act provides that the government department on whose behalf land is being acquired or any person interested who has not accepted the award of compensation or the amendment thereof may, apply within the prescribed time to the collector, for making a reference to the court. In *Lal Deen* v. *State of Rajasthan,*[44] the land acquisition officer made an award of compensation for acquisition of a well. Subsequently, the well was handed over to the military authorities. According to the award, compensation was placed at the disposal of collector for public utilities as it related to a public property. The petitioner did not accept the award and made an application for reference to the court. The collector refused to make the reference on the ground that no new ground had been shown by the applicant regarding his ownership of the well and the available proof had already been examined at the time of giving the award. The court quashed the collector's order on the ground that the collector had no jurisdiction to decide the application on merits. No discretion vested in him for refusing to make a reference once the conditions mentioned in section 18(1) were fulfilled. The failure to exercise jurisdiction was not proper. It has

37. A.I.R. 1986 P. & H. 207.

38. *Supra* note 30.

39. A.I.R. 1983 Cal. 61; also *Ahmed Hussain* v. *State*, A.I.R. 1950 Nag. 138; *A.C.C. Ltd.* v. *R.K. Mehra*, A.I.R. 1973 P. & H. 342.

40. *State of U.P.* v. *Khairunnisa Begum*, A.I.R. 1983 All 320; see also *Kasturi Devi* v. *Collector, Nainital*, A.I.R. 1983 All 338.

41. A.I.R. 1962 S.C. 764.

42. Supra note 33.

43. *Dhanni* v. *State of Rajasthan*, A.I.R., 1983 Raj. 62; see also *Military Estates Officer* v. *Zamindaran Air Field*. A.I.R. 1983 J. & K. 91, where rule 9(3) of the Requisitioning and Acquisition Rules, 1969 was held to be ultra vires sections 8 and 16 of the J. & K. Requisitioning and Acquisition of Immovable Property Act, 1968.

44. A.I.R. 1983 Raj. 225.

likewise been held in *Bhera Ram* v. *State of Rajasthan*[45] that once an award had been passed and filed in the collector's office, the land acquisition officer had no jurisdiction to review the award. The court, however, did not quash the order passed by the land acquisition officer after reviewing his own earlier order on the ground that the quashing of the second order would amount to restoration of an illegal order. It has likewise been held that the order passed by the A. P. Housing Board under A. P. Housing Board Act, 1956 directing the allottees of a house to close the ventilator as it affected the privacy of inmates of a neighbouring house was without jurisdiction and illegal.[46]

VIII. SUB-DELEGATION

Section 6(1) of the Land Acquisition Act provides for the authority which is to sign on behalf of the government. When the appropriate government is satisfied that any particular land is needed for a public purpose "a declaration shall be made to that effect under the signature of a Secretary to such Government or some officer duly authorised to certify its orders." In *I. G. Joshi,*[47] the declaration was signed by the under-secretary "by order and in the name of the Governor". The authentication was thus in accordance with article 166 of the Constitution. Upholding the action, the court pointed out that under the relevant Rules of Business of the government, all secretaries were placed on equal footing as regards authentication of governmental orders. It was further held that even if the under-secretary did not possess the powers as secretary, he would have been competent as an officer duly authorised to authenticate the orders under the Rules of Business.

If there is no enabling provision, the executive authority could not sub-delegate its power to arrive at a particular satisfaction. Thus, the satisfaction under section 6(i) of the Land Acquisition Act and section 6(ii) of the Rajasthan Land Acquisition Act, 1953, could not be delegated. In *Mela Ram*[48] the power to certify the satisfaction and also the decision to acquire land was delegated by the government to the collector. The court quashed the exercise of power by the collector, since no delegation in favours of collector was permissible to arrive at 'satisfaction' about the requirement of land.

IX. NATURAL JUSTICE

9.1. Since the decision of the House of Lords in *Ridge* v. *Baldwin,*[49] the courts have virtually discarded the traditional distinction between administrative and quasi-judicial functions in so far as the application of the principles of natural justice is concerned. The courts insist on fairness in all executive actions which entail any civil or penal consequences. Article 14 strikes at arbitrary actions of state and its instrumentalities. The rules of natural justice have been held to be applicable not only to cases covered by article 14 but to all cases of decision-making by the state and its agencies. These rules are applicable in all cases except when they have been expressly or impliedly excluded. The watershed in this area in India is provided by *State of Orissa* v. *Dr. Bina Pani Dei*[50] and *A. K. Kraipak* v. *Union of India*[51] and the principles of natural justice have now crystallised in cases such as *Maneka Gandhi* v. *Union of India,*[52] *Mohinder Singh Gill* v. *Chief Election Commissioner,*[53] *S. L. Kapoor* v. *Jag Mohan*[54] and *Swadeshi Cotton Mills* v. *Union of India.*[55]

9.2. The norms of fairness and principles of natural justice have been applied by the courts in cases relating to land acquisition, land ceiling, slum clearance and housing schemes. Sometimes, the statute itself prescribes a particular procedure to ensure fairness in action such as notice, inviting and consideration of objections, publication and even hearing to the person likely to be affected by the proposed action. The courts have quashed executive actions taken in violation of the prescribed procedure. But very often, the courts have insisted on the observance of the principles of natural justice even though not statutorily required.

9.3. The pavement and slum dwellers and hawkers of goods and wares on public roads and streets have posed a serious threat to the planned development of towns and metropolitan cities and have created serious inconvenience to the members of the general public who have a right to unhindered use of public places. The attempts of the State Governments and local authorities to evict them have been met with stiff resistance. They have generally pleaded their own

45. A.I.R. 1986 Raj. 113.
46. *K. Shakunthala* v. *A.P. Housing Board Gruhakalpa, Hyderabad*, A.I.R. 1986 A.P. 251.
47. *I.G. Jodhi* v. *State of Gujarat* A.I.R. 1968 S.C. 870.
48. *Mela Ram* v. *State of Rajasthan*, A.I.R. 1984 Raj. 116.
49. (1964) A.C. 40.
50. A.I.R. 1967 S.C. 1269.
51. A.I.R. 1970 S.C. 150.
52. A.I.R. 1978 S.C. 597.
53. A.I.R. 1978 S.C. 851.
54. A.I.R. 1981 S.C. 136.
55. A.I.R. 1981 S.C. 818.

fundamental right to life and carry on their business at the places they have occupied for a long time. Thus in *Olga Tellis* v. *Bombay Municipal Corpn.*[56] the petitioners claimed their fundamental right not to be evicted from their shelters located on the pavements without notice and being offered suitable alternative accommodation having basic amenities like water, drainage, electricity, etc. They claimed their rights under article 21 of the Constitution on the basis that the right to life would be illusory without a right to protection of the means by which alone life could be lived, i.e., means of bare subsistence available in the city and that right could be taken away only by the procedure established by law which was fair and reasonable. The respondents admittedly demolished huts on the pavements without notice since it was not required under section 314 of the Bombay Municipal Corporation Act, 1888. The petitioners contended that the procedure prescribed by section 314 was in violation of article 21 as it not only did not require giving of notice before demolition but expressly provided that the corporation may cause the encroachment to be removed "without notice". Y. V. Chandrachud C. J., (as he then was) while upholding the validity of the section, held that that section was merely an enabling provision. It did not command that the Commissioner shall cause an encroachment to be removed without notice. He had merely a discretion to do so. That discretion was to be exercised in a reasonable manner in accordance with the constitutional mandate contained in article 21 that the procedure for performing a public act must be fair and reasonable. The power was to be exercised sparingly in cases of a tenancy which brook no delay. In other cases, no departure from the *audi alteram partem* rule was presumed under that provision which provided only an exception and not the general rule. A departure from the fundamental rules of natural justice would be presumed to be intended by the legislature only in circumstances which warranted the same and these circumstances must be shown to exist by those who affirmed their existence when required to do so. Notice was necessary even though in a generality of cases the pavement dwellers may not have an effective answer for their action because justice should not only be done, it must manifestly be seen to have been done. In *K. Chandra* v. *State of Tamil Nadu*,[57] the Supreme Court was satisfied that the Government was taking necessary steps for improving slums and providing alternative accommodation to the slum dwellers and that was why it did not pass any order except that their removal was stayed for about six months. Merely providing alternative site to the slum dwellers was not considered adequate by the Madras High Court on the ground that the statutory requirement of show cause notice for declaring an area slum clearance as prescribed under section 11 (1) of the Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971 had not been complied with.[58] The Andhra Pradesh High Court has held that if a notification was issued under the A. P. Slum Improvement (Acquisition of Land) Act, 1956, declaring an area as slum, no civil consequences follow from that notification until another notification acquiring the land was issued. Therefore the principles of natural justice were not attracted at the stage of first notification. The first notification can however be challenged after the second notification for acquisition of land had been issued.[59]

9.4. With reference to the Urban Land (Ceiling and Regulation) Act, 1976, it has been held that while granting exemption under section 21(1) to hold land in excess of the ceiling limit, a tenant of the premises was not entitled to be heard as such exemption did not amount to final determination of the rights of the parties and therefore, there was no violation of the principles of natural justice.[60] However having regard to the object of that section and serious consequence which will ensue in case the claim of exemption was not accepted, it has been held that the claimant has to be heard before refusal of his claim so that he could show that either the public interest would suffer or undue hardship would be caused to him in case the exemption was not granted. The rule of natural justice has not been excluded in such a case. As the claimant in the present case was not heard before his claim was rejected, the decision of the competent authority was quashed on the ground of lack of fair hearing.[61]

9.5. The Cantonment Board has power under the Cantonment Act, 1924 to revise or reconsider a building plan sanctioned by it after affording an opportunity of showing cause and hearing the persons affected.[62] The Municipal Commissioner has power under the

56. A.I.R. 1986 S.C. 180. See also *Bombay Hawkers' Union* v. *Bombay Municipal Corpn.*, A.I.R. 1985 S.C. 1206.

57. A.I.R. 1986 S.C. 204. See also *V.P. Singh* v. *Ram Kali Devi*, A.I.R. 1986 Del. 149.

58. *Kasi* v. *Govt. of Tamil Nadu*, A.I.R. 1985 Mad. 169.

59. *Co-operative Housing Society, C.E.* v. *Commissioner, Hyderabad Municipal Corpn.*, A.I.R. 1985 A.P. 277.

60. *M/s. India Cable Co. Ltd.* v. *Govt. of Andhra Pradesh*, A.I.R. 1987 A.P. 28.

61. *D.A. Bhat* v. *Spl. Dy. Commissioner & Competent Authority*, A.I.R. 1987 Kant. 5; see also *Manilal* v. *State of Gujrat*, A.I.R. 1985 Guj. 47.

62. *Cantonment Board, Delhi Cantt.* v. *Mangey Ram*, A.I.R. 1987 Del. 77.

Maharashtra Regional and Town Planning Act, 1966 to revoke or modify the permission already granted by it if he finds it expedient to do so having regard to the development plan prepared or under preparation. The power has, however, to be exercised after hearing the person affected. He should be paid compensation for loss incurred by him for no fault of his own.[63] When a contracteor appointed by the Tamil Nadu Slum Clearance Board did not perform his contract within the stipulated period of time, the court insisted that before determining his contract, forfeiting the security deposit and blacklisting him for future contract, the board must provide an opportunity of hearing to the contractor.[64]

9.6. While exercising the power of demolishing an unauthorised construction under the Gandhidham (Development and Control on Erection of Buildings) Act, 1958, the Gujarat High Court has held that, while deciding an appeal against an order of the Gandhidham Development Authority for demolition, the Board of Appeal exercises quasi-judicial power and therefore, it must hear not only the owner of the structure but also the occupier so that the confirmation order of the Board may become fully effective and operative.[65]

9.7. When a piece of land has been allotted to a co-operative society for the construction of residential houses, the allotment cannot be cancelled without providing the society an opportunity of hearing.[66] This principle was, however, not applied by the Punjab & Haryana High Court in respect of a resolution of the Amritsar Improvement Trust for allotting a plot of land in the petitioners favour.[67] This difference of approach seems to be justified on the ground that while in the Madhya Pradesh case, the land had actually been allotted, in the Punjab case, only a resolution had been passed and the petitioner had acquired no right merely by reason of passing of the resolution. The resolution had yet to be acted upon by the Punjab Government.

9.8. If a procedure for hearing has been prescribed under law, the same must be complied with. Non-compliance would vitiate the order and even 'conclusive evidence' clause cannot save it from invalidation. The Punjab Town Improvement Act, 1922, prescribes the procedure for the framing and adoption of a scheme, its publication, inviting of objections and its consideration, modification of the draft scheme with reasons and submission of the draft scheme to the State Government for its approval along with detailed reasons for modifications, if any, in the draft, representations in original and the list of objectors. Then the State Government is required to notify the scheme and section 42(2) provides that the scheme as notified "shall be conclusive evidence that the scheme has been duly framed and sanctioned". In *Jodh Singh* v. *Jullundur Improvement Trust*,[68] the respondent prepared as street scheme and got it published as required. Due to oversight, the petitioner's objections were not considered as they had been misplaced and they were also not called for hearing along with others. Later on the scheme was notified by the Government. The court held that non-compliancse with the relevant provisions amounted to colourable exercise of power which should not be protected under section 42(2). Non-compliance amounted to Legal *mala fides* vitiating the action of framing as well as sanctioning the scheme. The court later quashed the notification and directed the respondent to consider the objection of the petitioner land owner after affording him an opportunity of hearing.[69]

9.9. The requirement of publication of notice under section 4(1) and inviting of objections under section 5A of the Land Acquisition Act are also mandatory except that the latter will not apply in cases of urgency as envisaged under section 17. The notice under section 4(1) must be published not only in the official gazette indicating the 'public purpose' for which the land was proposed to be acquired but the collector has also to cause public notice of the substance of such notification to be given at convenient places in the locality in which the land proposed to be acquired was situated. Both these requirements are mandatory and an acquisition of land by ignoring them would be fatal.[70]

9.10. Personal notice to each and every interested person under section 4(1) of Land Acquisition Act need not be given and in the absence of such notice, the proceedings will

63. *Digambar* v. *Pune Municipal Corpn.*, A.I.R. 1987 Bom. 297.

64. *Preetam Pipes Syndicate* v. *Tamil Nadu Slum Clearance Board*, A.I.R. 1986 Mad. 310.

65. *Pratap* v. *Gandhidham Development Authority*, A.I.R. 1985 Guj. 68.

66. *Awas R.G.N.S. Samiti Maryadit* v. *State of M.P.*, A,I.R. 1984, M.P. 164.

67. *Jagdish Rai* v. *State of Punjab*, A.I.R. 1984 P. & H. 102.

68. A.I.R. 1984 P & H. 398.

69. *Jodh Singh* v. *Jullundur Improvement Trust*, A.I.R. 1986 P. & H. 158.

70. See *Collector (District Magistrate), Allahabad* v. *Raja Ram*, A.I.R. 1985 S.C. 1622; *Khub Chand* v *State of Rajasthan*, A.I.R. 1967 S.C. 1074; *Narendra Bahadur Singh* v. *State of U.P.*, A.I.R. 1977 S.C. 660.

not be invalid.[71] But such notice to all would be necessary when the statute requires it expressly.[71a]

Section 5-A of the Land Acquisition Act requires the collector to give an opportunity of hearing to the objectors whose land is proposed to be acquired for a public purpose. After hearing, he has to submit a report to the Government for final decision under Section 6. It had been held that even though collector's report is merely recommendatory, he cannot violate the rule of natural justice but the Government while taking final decision is not bound by the rules of natural justice.[72]

9.11. It is well established that the principles of natural justice are not applicable in exercise of legislative function. This principle was followed in *Natraj Construction Co.* v. *Government of A. P.*[73] Section 59 *of the Andhra Pradesh Urban (Development)* Act, 1975 empowers the Hyderabad Urban Development Authority to frame regulations consistent with the provisions of the Act subject to the approval of the State Government. It was held that this provision did not imply a duty to hear the parties while making zoning and the multi-storey buildings regulations.

X. PROMISSORY ESTOPPEL

10.1. Recently, the courts have began applying the equitable doctrine of promissory estoppel against the Government and other public authorities in the matter relating to the development of towns. The first most significant decision of the Supreme Court was in *Express Newspapers Pvt. Ltd. v. Union of India.*[74] In this case, the Supreme Court clearly stated that if an authority, competent to sanction the construction of a building in an urban area (that is, if it has acted within the scope of its authority) and has given its sanction, it shall be assumed that while giving sanction it had considered all the laws and plans concerning the matter. If a person, relying on such permission, has started construction of the building and spent money, the authority cannot later on be allowed to demolish the building or take any other action for violation of any law, regulation or building plan. In this case, the petitioner was the lessee of two plots of land belonging to the Union of India and had constructed a building on a portion of the said plots. In 1978, the Union Minister for Works and Housing, acting on behalf of the lessor, and the Vice-Chairman, Delhi Development authority, granted permission to the petitioner to construct a new building with an increased FAR of 360 and a double basement. When the construction of the new building was in progress, the petitioner was served with two notices. The first was by the Zonal Engineer, (building), Municipal Corporation of Delhi, to show cause why action for demolition of the building should not be taken under sections 343 and 344 of the Delhi Municipal Corporation Act, 1957 for having started unauthorised construction of excess basement contrary to the Delhi Master Plan, zonal regulations and municipal bye-laws. The second was issued by the Engineer Officer, Land and Development Office, New Delhi, purporting to be on behalf of the lessor, Union of India, to show cause why the lessor should not re-enter upon and take possession of the premises in question on the ground of breach of some of the clauses of the lease-deed. These notices were challenged by the petitioner before the Supreme Court under Article 32 of the Constitution. It was contended that the petitioner had started the construction work only after getting the requisite permission of the competent authorities and therefore the respondents should be estopped from contending that the new building was being constructed in violation of Master Plan, regulations any bye-laws. Justice A. P. Sen, while accepting the petitioner's contention, held that the doctrine of promissory estoppel was clearly applicable in this case against the respondents. After having granted the permission to construct the building, they could not be allowed to contend that the order of the Union Minister was illegal, improper or invalid. Admittedly, the Union Minister had acted within the scope of his authority in granting the permission of the lessor as permitted by Article 77(3) of the Constitution of India. The doctrine of *ultra vires* was, therefore, not applicable in the present case and the Union of India was bound by the rule of promissory estoppel. After this case, it has become abundantly clear that the competent authorities while according approval for any scheme, must carefully consider all the relevant laws and plans. This case to some extent dilutes the rigour of the principle that estoppel does not apply against law.

10.2. The Madhya Pradesh High Court, however, did not apply the doctrine in *Hind Housing Co-operative Society Ltd.* v. *State of Madhya Pradesh*[75] on the ground

71. *State of Gujarat* v. *Panch of Nani Hamam's Pole*, A.I.R. 1986 S.C. 803.

71a. *Urban Improvement Trust* v. *Balveer Singh, A.I.R.* 1986 Raj 71; see also *State of Karnataka* v. *Kempaiah*, A.I.R. 1984 Kant 208.

72. *Bai Malimbu* v. *State of Gujarat*, AIR 1978 SC 515; see also *Abdul Hussain* v. *State of Gujarat*, A.I.R. 1968 SC 432.

73. A.I.R. 1984 A.P. 59.

74. A.I.R. 1986 S.C. 872.

75. A.I.R. 1987 M.P. 193.

that when the petitioner started the development of the land for residential purpose in accordance with sanctioned plan as approved by the Joint Director, Town and Country Planning, the plan had not been prepared in accordance with the procedure prescribed under the Madhya Pradesh Nagar Tatha Gram Adhiniyam, 1973. The enforcement of such a scheme would have clearly violated statutory provisions and that was the reason why the court refused to apply the doctrine of promissory estoppel in this case. In this connection, reference can also be made to *Digambar* v. *Pune Municipal Corpn.*,[76] in which the court held that the permission granted for development of a plot can be revoked if it is expedient to do so having regard to the development plan in existing or under preparation but that could be done by paying compensation to a person, who had suffered loss for no fault of his own.

10.3. When a housing scheme is prepared, provision is always made for basic amenities like air, light, water, health and hygiene. Moreover, the authorities also make provision for educational, medical and recreational activities and for that purpose, sites earmarked for parks, roads, community centres, educational institutions, places of worship, etc. But while calculating the price of plots for construction of houses and flats, the price for the above sites are also taken into account and therefore, when a person purchases a plot of land for constructing a house, he expects that the sites earmarked for a patricular purpose will be utilised for that purpose alone and he will enjoy the benefit as general members of the public from such amenities. The doctrine of promissory estoppel was applied by the Madhya Pradesh High Court in *Kantilal* v. *Chairman, Town Improvement Trust, Ratlam*[77] against a decision of the State Government to dispose of open land which was set apart for a garden for the residents as provided under section 30 of the Madhya Pradesh Town Improvement Trust Act, 1960. In this case, the open land in question was proposed to be given on lease to Sindhi Samaj for the construction of a dharmashala. Applying the doctrine of promissory estoppel, the court held that the disputed open land was meant for common beneficial use of the inhabitants in accordance with the town improvement scheme and when the plots were offered to the public on the basis of that scheme, there was an implied promise given to the intending purchasers that the open land would be kept an open land and it could not be leased out. The court further held that no doubt the respondent would be at liberty to change the purpose of the use of open land but that had not been done in the present case with the concurrence of the State Government as required. This case thus clearly indicates that if a site has been earmarked for a particular purpose, there could be a change in that purpose if it was permissible under law and that could be done in accordance with the procedure laid down under the statute. In *T. Damodhar Rao* v. *S. S. Municipal Corpn., Hyderabad,*[78] it was likewise held that the land reserved for recreational park under the development plan could not be used for any other purpose like construction of residential houses.

In fact, change in the use of land was upheld by the Punjab & Haryana High Cort in *Sukhdev Singh* v. *State of Punjab.*[79] In this case, certain pieces of lands under a housing scheme were reserved for primary and higher secondary schools and community centre under the layout plan as prepared under the Punjab Urban Estates (Development and Regulation) Act, 1974. Later on, the Government decided to allot the lands for Shri Radha Swami Satsang Bhawan and the Simla Chandigarh Diocese Society for setting up a Church and convent school. The plot-holders in the vicinity of the lands in question challenged the Government's decision on the ground that they had purchased the plots keeping in view the proposed amenities and the Government was bound by the rule of estoppel on the basis of its promise to provide them by not allotting the lands for any purpose other than for which an area reserved for special use was to be determined by the Chief Administrator in consultation with the chief town planner. The rules did not debar subsequent change in the nature of public use of any particular site approved by the authorities. The buildings for which the lands were being allotted were public buildings for public worship. The court accepted the Government's contention that even though the price paid by the petitioners included payment for the plots to be used for schools, cremation grounds and other public utility buildings, they could not argue that they paid the additional amount particularly for the construction of primary and higher secondary schools and community centre on the sites in question. The Court held that the Government's decision was in accord with the public policy and in the interest of public order, peace and harmony. This was a Governmental and

76. A.I.R. 1987 Bom. 297.
77. A.I.R. 1986 M.P. 134.
78. A.I.R. 1987 A.P. 171.
79. A.I.R. 1986 P. & H. 167.

executive function in consonance with the existing circumstances and the demands of the public interest and therefore the rule of promissory estoppel was not applicable in such a situation.

The doctrine of promissory estoppel was applied in *Atma Nagar Co-operative Building Society* v. *State*.[80] In this case, the City Improvement Trust adopted two schemes for land development. The Chairman of the Trust assured some persons that their request for allotment of land would be considered favourably if they formed a co-operative society. The society was formed and 90 plots of land were allotted in pursuance of the assurance, and money was paid by the society. Subsequently, the Trust abandoned the schemes due to court's intervention as there had been delay in land acquisition proceedings. The Trust formed another scheme but refused to accommodate the members of the society on the plea that with the abandonment of the previous scheme, the assurance of the chairman also lapsed. This action of the Trust was challenged. The court directed the Trust to submit the case of the society to the State Government for decision. The formation of society, and payment of money was done only on the assurance of the chairman. Acting on the assurance, the society had altered its position and therefore, the Trust was estoppel from refusing land to it on the ground of chairman's assurance. On the other hand, the abandonment of a scheme and refusal to allot land for residential purpose was held to be valid and the rule of promissory estoppel was not applied by the Delhi High Court in *R. K. Deka* v. *Union of India*.[81] In this case, the respondent announced a scheme in early 1978 for allotment of plots in New Delhi to non-resident Indians living abroad to build residential houses. The land measuring 400 sq. yards at the rate of Rs. 200 per sq. yard was to be allotted to an applicant who or whose family members did not own any land/house/flat in Delhi or New Delhi. The amount of money for land was to be paid in lump sum in foreign exchange and exchange worth Rs. 10,000 was required as registration amount, and the land was to be allotted in 1979. The scheme was dropped in 1981 in the interest of the public since the cost of land had increased manifold and it was not thought desirable to divert scarce resources of the country for such non-priority scheme for the benefit of rich non-resident India who could afford to purchase land in the open market. The court refused to bind the Government on the ground of promissory estoppel as a policy decision could be changed by another policy decision.

80. A.I.R. 1979 P. & H. 196.

81. A.I.R. 1984 Del. 413.

XI. EMERGING LEGAL PROPOSITIONS

11.1. The judicial response in cases involving *mala fides* has been mixed. The courts seem to insist a very high degree of proof to sustain the allegation of *mala fides*. But when requisite proof has been made available by the petitioner and the proof has not been rebuted by the Government official alleged to have acted *mala fide*, the courts have not hesitated in striking down the impugned action.

11.2. Merely because the government decides to acquire a particular piece of land and abandone its proposal or decides to acquire another piece of land has not been held to be a ground to vitiate the proceedings on *mala fide* ground in the absence of adequate proof.

11.3. As a general rule, it is for the government to decide which particular land should be acquired and for what purpose that is to be done and the courts do not decide such questions on merits unless *mala fides* are proved.

11.4. The absence of public purpose may itself vitiate the land acquisition proceedings on *mala fide* ground.

11.5. The courts have taken a serious view of the executive action regarding exercise of power for a purpose other than the one for which it was conferred and such actions have been treated as *mala fide*.

11.6. The allegation of *mala fides* must be made with precision and proof and the official alleged to be responsible for the *mala fide* action must be made a party to the proceedings except when the action is taken by the government and the petitioner does not know as to which official was responsible for the impugned action.

11.7. Under the urban laws, the courts have applied the same norms of fairness and reasonableness as they have done in respect of other executive actions.

11.8. Even in cases of removal of unauthorised constructions or encroachments from pavements and streets, the courts have insisted notice as a general rule in accordance with the constitutional mandate of Article 21 of the Constitution.

11.9. There is nothing to prevent an authority from exercising its statutory powers of revising plans, revoking/modifying a building plan already sanctioned by it, cancelling an allotment of land or ordering demolition of unauthorised construction but any such action must be taken only after following the principles of natural justice to all those likely to be adversely affected by the action.

11.10. If the statute prescribes a procedure of hearing, the prescribed procedure must be strictly followed, otherwise the action would be alleged and quashed by the court.

11.11. The executive actions which are proved to be arbitrary, unreasonable or discriminatory have been quashed by the courts uniformly without any hesitation. This has been done in cases relating to land acquisition, determination and payment of compensation, etc.

11.12. While conferring discretionary powers on executive authorities, the courts have emphasised that adequate guidelines must exist for the guidance of the authority for exercising power. The conferment of unguided and uncanalised discretionary powers have been quashed.

11.13. Legislations prescribing two different procedures for acquiring land are not in themselves discriminatory unless the land owners are put to a disadvantage without there being reasonable classification made to achieve a lawful objective.

11.14. Prescribing two different modes of calculating the amount of compensation to the land owners without reasonable classification is discriminatory but a classification between two types of land owners could legitimately be made such as land in urban area and land in rural area.

11.15. Arbitrary increase in the cost/price of land/house/flat is not permissible even if there is power to increase the price/cost.

11.16. Reservations in the allotment of land/houses can be made without being hit by the equality clause of Article 14.

11.17. A power conferred on the government or its officials to be exercised on the subjective satisfaction, must be exercised on objective considerations.

11.18. The exercise of power by ignoring relevant considerations or taking into account irrelevant considerations would vitiate the executive action.

11.19. The doctrine of promissory estoppel has been held to be applicable on the basis of promises, assurances and representations made by the officials and the government through public notice or even otherwise, provided that they were not contrary to statutory provisions and they were made by the person or authority competent to do so, i.e., the action was not *ultra vires* the person or authority.

11.20. The doctrine of promissory estoppel has been applied by the courts to cases involving demolition of construction, use of land and allotment of land/houses.

11.21. The plea of executive necessity or freedom of action or change of policy has sometimes been accepted as a good ground against the doctrine of promissory estoppel.

11.22. If an authority has acted *ultra vires* its powers, the action would be invalid.

11.23. Generally executive functions can be delegated but the power to arrive at a "satisfaction" cannot be sub-delegated unless there is express provision to do so.


सत्यमेव जयते

Judicial Process and Urbanisation
Role of the Supreme Court

Amita Dhanda


सत्यमेव जयते

JUDICIAL PROCESS AND URBANISATION ROLE OF THE SUPREME COURT

I. INTRODUCTION

1.1. Urbanisation can be termed as a social change process which alters the existent social structure. As any other social change process the programme vests and divests benefits that is it has a beneficiary constituency and a target group. Planned social change requires that the law or administrative scheme effecting such change should neutralize the antipathy of the target group and enlist the active support of the beneficiary constituency. Failure to do so, could lead to wreckage of the social change scheme by the divested groups.

1.2. Whether it be town planning measure, land acquisition schemes, land user patterns or building standards for houses, implementation of each of these measures has been attempted through the instrument of law. A number of these laws divest vested interests which introduces conflict between the target and beneficiary group. The law makers failed to take cognizance of these conflicts/disputes whilst making the law. This could be because lawmaking is still seen more as a drafting exercise rather than as a social engineering task. As a result a large number of laws attempting to introduce planned urban development were litigatively stalled for a number of years.

1.3. In so far as urban policy makers have made extensive user of laws for achievement of urbanisation objectives; they should be equally concerned about ensuring that these legislations fulfil their avowed objectives and are not litigatively emasculated. This requires that the opposition of the target group should be neutralized by making litigation both economically and legally unattractive. If the benefits the legislation provides to the target group are attractive and the chances of getting better terms on agitation small, litigation becomes economically non-feasible.[1] And if the legislation anticipates and guards against possible challenges litigation becomes legally inadvisable. At present the technique adopted by lawmakers is that after a legislation has been struck down by the court remedial measures in the shape of amendment etc. are taken. This technique necessarily delays implementation of the programme and reduces its cost effectiveness. It is therefore essential that policy-makers should actively and scientifically involve themselves with lawmaking and not just passively await judicial verdicts on them. One means of obtaining input on drawbacks of legislations in any sphere could be to analyse the litigation occurring in that field.

1.4. Analysis of litigation should yield information on the composition of the target and beneficiary groups, their unresolved conflicts and the deficiencies in the law which failed to resolve or neutralise these conflicts.

1.5. As courts do not function in isolation but in interaction with other agencies such as the legislators, lawyers and litigants, litigation analysis also yields information on the role played by each of these agencies in the decision-making process and in the success or failure of any legislation. The analysis makes it possible to pinpoint what caused a legislation to run into litigative roadblocks. Whether it was bad drafting, incompetent lawyering or recalcitrant judicial attitudes? According to the diagnosis made existing and future strategies of social change can be modified.

1.6. We think that such like studies of the adjudicative process are essencial if legislations are to fulfil the policies for which they are made. Keeping this background in mind this report studies the role of the judiciary in the field of urbanisation. The concept of urbanisation encompasses within it a wide variety of issues. However as most of the cases handled by the judiciary, centre around the question of acquisition and civic rights, we will concentrate on these contexts.

1.7. Judicial decisions occuring in the sphere of urbanisation can be broadly categorised in the following manner : decisions (i) where the courts are required to resolve a particular individual's specific problem, (ii) where divergent interest groups seek conflict resolution. As the first kind of decisions, do not provide in any major way, matters of judicial policy, we concentrate on the second kind of decisions.

1.8. Again keeping in view the purpose of this study, it was considered apposite to limit the study, to the decisions of the Supreme Court.[2]

PART I

II. THE ACQUISITION CONTEXT

2.1. The power of acquiring land for a public purpose after giving compensation was granted to the State by articles 31(1) and (2) of the Constitution. The power was utilised for promulgating land reform legislations which would confer land to the tiller. Governmental acquisition was also considered a practicable way of carrying out orderly city and regional planning so that unused or wastefully used lands could be utilised to meet the requirements for housing, industrial development and for adequate ancilliary facilities and amenities.

1. For further discussion on this point, see para 9.2 *infra*.

2. *Vide* Art. 141 of the Constitution of India the decisions of this court are binding on all the courts in India and are as much the law of the land as the legislations they interprete. Also by reason of the nature of jurisdiction conferred on the court only cases involving major issues of law and policy are adjudicated upon by it.

2.2. 'Quantum of compensation' has been the major bone of contention in acquisition litigation. An explanation offered by a learned author[3] merits attention. He informs that the question of quantum of compensation generated a great degree of conflict and disagreement in the constituent assembly; with the representatives of the landed gentry demanding full and fair compensation and the liberals opposed to grant of any such compensation upon zamindari abolition. This conflict was resolved with the landed gentry group accepting less than fair compensation for zamindari abolition and the liberals acceded to the general application of the fair compensation norm. This compromise was not explicitly incorporated in the constitution. Instead an ambiguously worded article which could be read according to the compensation ideology of both groups was made law. It was this unresolved drafting conflict and not the attitude of the court, holds the author which caused compensation litigation to surface and multiply.

2.3. It should be appreciated that acquisition laws did not just mirror existing conflicts they also created them. Acquisition schemes were not launched only as 'distributive justice measures'. They were also vehicles for launching industrial development programmes and thus changed land user patterns. Changed user of the land made for quicker appreciation of land value and industrial expansion opened new avenues of economic development. These economic changes affected the elite composition of the country. As the deprived owner was not a necessary participant in the industrial expansion schemes, in seeking full compensation he was not just seeking recompense for the land acquired but also for its future user.

A. THE COMPENSATION CONTROVERSY : QUANTUM OF COMPENSATION

3.1. The first major case on the issue of compensation was *State of W.B.* v. *Bella Banerjee*[4] which started the process of the government desiring to pay the least compensation possible and the deprived owner seeking the maximum amount. In that case the legislative formula of fixing compensation on the basis of market value of property prevailing at a fixed date specified in the impugned statute, irrespective of time of acquisition came up for judicial scrutiny. The court rejected claims of the government that the legislature had the power to grant less than full indemnification. It held that within the basic requirement of full indemnification the constitution allows free play to the legislature to determine the principles on which compensation was payable. Whether such principles take into account all the elements which make up the true value of property was held to be a justiciable issue.

The formula of 'fixed land value' was rejected as arbitrary which could not be regarded as compliance with Article 31(2) of the Constitution. The court however indicated that freezing of land value could be permitted in order to prevent profiteering.

3.2. Freezing of land value for purposes of compensation to prevent profiteering was held permissible by the Supreme Court. The Court however had at the same time found fixed date land value freezing impermissible. The Madras government interpreted this ruling as 'fixed date land value freezing was permissible for preventing profiteering'. Though, this contention was not accepted in the High Court[5] the government persisted with this stand in the Supreme Court where also it was rejected.[6] If the *Bella Banerjee* ruling had been imaginatively read the government could have successfully used the mechanism of a 'rolling anterior land value' for awarding compensation. Under this mechanism instead of fixing one market value date for all acquisitions under the statute; market value antedating could be related to particular acquisitions. If this changed mechanism which was in accordance with the Court's ruling in *Bella Banerjee* was struck down by the Court it could have been accused of inhibitory tactics. However if the government persists in using a principle for granting compensation clearly declared unconstitutional, the court cannot be faulted for striking it down.

3.3. How 'compensation' in Article 31 should be operationalized was not settled when the constitution was finalized. In *Bella Banerjee* the Supreme Court operationalized 'compensation' as full indemnification. In so defining compensation the court initiated a dialogue with the legislature and the executive on the question of compensation. An answer was attempted to be sought to the issue left unresolved by the constituent assembly. The legislature or in substance the government refused to participate in this dialogue. And in order to attain legislative supremacy to settle compensation, it made adequacy of compensation 'non-justiciable'.[7] The purpose of the amendment was to oust the just requirement standard of compensation but largely due to some persuasive lawyering on behalf of the deprived owner and some unimaginative representation of the state's view,[8] this purpose was thwarted in *Vajravelu* v. *Special Deputy Collector*.[9]

3. H. Merillat, *Land and Constitution in India* (1970).
4. A.I.R. 1954 S.C. 170.
5. *Namasivaya Mudaliar* v. *State of Madras*, AIR 1959 Mad 548.
6. *State of Madras* v. *Namasivaya Mudaliar*, AIR 1965 SC 190.
7. Constitution Fourth Amendment Act, 1955.
8. For amplification of this point see lawyering strategies *infra*.
9. AIR 1965 SC 1017.

3.4. The court held that Parliament had continued to use the expression 'compensation' which necessarily implied that it accepted the court's enunciation of the term. For if Parliament intended to adopt, a standard different from "just equivalence" they would have used some other expression. By virtue of the amendment if more than one formula were available to arrive at just equivalence the court could not question on grounds of inadequacy the formula adopted. However, if the law laid down priciples which were not relevant to the value of the property acquired, at or about the time that it was acquired and the compensation was illusory the legislature could be said to have committed a fraud on power and the courts were empowered to strike down the law.

3.5. Just equivalence thus remained the standard for compensation though the power to pronounce this standard was transferred from the court to the legislature. However, in *Union of India* v. *Metal Corporation of India*[10] this pronouncement of the court was not honoured. The principles of compensation enunciated by the legislatures, were struck down as they did not accord with the court enunciated principle of just equivalence. The effect of the fourth amendment was thus largely nullified and legislative supremacy in compensation matters was again ousted.

3.6. This stance did not last long and in *State of Gujarat* v. *Shantilal*[11] the court accepted that the very purpose of the fourth amendment was that the legislature wished to have the freedom to enunciate a standard of compensation different from just equivalence. And in order to enable itself to do so they made adequacy of compensation non-justiciable. Having conceded this point the *Shantilal* court also did not accept that the fourth amendment totally ousted judicial review. It reiterated that if the principles on which compensation was to be granted were irrelevant or the amount of compensation was illusory the court could intervene not because there was inadequate compensation but because there was no compensation.[12]

3.7. The *Shantilal* decision does controvert the contention that the judiciary has functioned as an inhibitor of urbanisation policies. Though this contention is even more clearly repudiated by *Udai Ram* v. *Union of India*[13] wherein the constitutionality of the Land Acquisition (Amendment and Short Title Validation) Act, 1967, was upheld. This Act in opposition to an earlier decision[14] of the court allowed that a single notification under S. 4(1) of the Land Acquisition Act could be the basis of more than one acquisition under s. 6 of the Act. The contention of the petitioners was that the whole purpose of the amendment was to avoid payments of enhanced compensation which would be necessary if fresh notifications under section 4 had to be issued. The court rejecting this contention held that the validating Act did not enact any law which directly affected compensation.[15]

Anyway after the fourth amendment adequacy of compensation was non-justiciable. In upholding the validating Act the court was greatly influenced by the purpose for which the impugned notification was passed i.e. the planned development of Delhi. Such planned development the court emphasized could not be simultaneously undertaken for the entire earmarked land considering the limited resources of the state. Successive notifications under s. 6 were thus necessary and constitutional.

3.8. *Vajravelu* and *Shantilal* demonstrated the volatile nature of the judicial process. This volatility was again in evidence when in *R. C. Cooper* v. *Union of India*[16] the court struck down the Banking Company (Acquisition and Transfer of Undertakings) Act 1969 and one of the grounds of invalidation was that the principles of compensation specified in the Act had no relevance to the acquired property. The method of valuation omitted evaluation of many important items of the acquired assets. And the adoption of these irrelevant and unrecognized principles of compensation resulted in the grant of no or illusory compensation to the expropriated owners.

3.9. This case augured the introduction of the 25th Constitution Amendment Act 1971 wherein Parliament taking guidance from the courts dictum in *Vajravelu*[17] replaced the term 'Compensation' with the term 'amount' and made the adequacy of amount non-justiciable. This amendment came to be challenged in the epic case of *Keshvananda Bharti* v. *State of Kerala*,[18] where the constitutionality of the amendment was upheld. The court however protected judicial review by holding that it was open to the court

10. AIR 1967 SC 637.
11. (1969) 1 SCC 509.
12. This dictum of the court has been criticized as anomalous cause the court had abandoned the just equivalence standard and failed to provide any other with reference to which illusory compensation will be adjudged. See U. Baxi "*State of Gujarat* v. *Shantilal* a requiem for just compensation" 9 Jaipur L.J. 29.
13. AIR 1968 SC 1138.
14. *State of M.P.* v. *V.P. Sharma* (1966) 3 SCR 557. For a more detailed analysis of this case see para 7.2 *infra*.
15. This declaration of the court was not unanimous. Justices Shelat and Vaidialingam found that the real purpose of enacting the impugned Act was to avoid compensation for appreciation in land values. In the guise of validation the Act had frozen land values. The purpose of acquisition could not fill lacunae pointed in *Sharma's case supra n.* 14.
16. (1970) 1 SCC 248.
17. See para 3.4 *supra*.
18. (1973) 4 SCC 225.

to consider whether the amount in question has been arbitrarily determined or whether it is an illusory return for the property acquired. It was also open to the court to consider whether the principles laid down for the determination of the amount were irrelavant to the acquisition or requisition in question. The curtain to this ding dong battle of legislative versus judicial supremacy was brought down with the forty-fourth amendment reducing the right to property to the status of a legal right.[19] That the government should see eradication of the fundamental right to property as the only means of getting out of the compensation impasse is a matter of no surprise. Though whether this technique will succeed remains contentious.[20] Our entire analysis shows that the government throughout views ousting of judicial jurisdiction as the solution to all its compensation tangles. It therefore refused to examine litigation in the area in order to assess the shortfalls of its compensation policy.

3.10. Such an examination we think would have brought home to the government the need for a scientific policy on compensation to consider the cost benefit on a long term basis of a policy where the minimum amount possible is offered as land value compensation.[21] For if an acquisition policy is jammed due to litigation for a decade not only will the land value have appreciated but the cost of the operation the government wished to carry on the acquired land would have also trebled. Instead of avoiding judicial review[22] if a policy of justiciability had instead been framed the technique suggested by Mukherjee and Wilcox[23] could have been experimented by the government. They suggest that the government should fix up reasonable compensation for a piece of acquired land and take possession. The deprived owner has to accept this fixed compensation without prejudice to his right to agitate for a higher compensation. However, the compensation fixed should give recognition to court enunciated principles and should be so attractive as to make agitation for enhancement an expensive and risky affair. However, such like experimental strategies are not likely to be attempted if the judicial form is only seen as a stumbling block which has to be removed and the pronouncements of that institution are treated with scant respect.

B. *Public Purpose*

4.1. Apart from compensation the other major argument rubric in the Article 31 acquisition litigation was 'public purpose'. Herein private interest challenged the state's connotation of public purpose i.e. the controversy centered around the question whether what was deemed to concern large sections of the people was really involved with them. This supports our observation[24] that acquisition litigation was a tussel between the divested and the vested groups. Even though, litigation on the public purpose issue was not as bitterly contested as on the compensation question. Claims of governmental supremacy for specifying what constitutes public purpose and what land was required for such purpose were more easily accepted.

4.2. In the first major case[25] on the issue, the government's activating of the acquisition machinery in order to acquire land for a company was questioned. Where the query was, whether the consideration that private companies also fulfil national goals of industrial development and employment generation, should be the influencing perspective in examining validity of land acquisitions for companies. Or whether it should be acknowledged that private industries are set up by private entrepreneurs for private profit. As usefulness to the public is minor the governmental machinery of land acquisition should be made available only where more than incidental concern for public benefit is shown. The court by a majority lended its support to the divested individual and thus upheld the latter view.

4.3 The decision led to the amendment of the Land Acquisition Act and S. 40(aa) was incorporated which retrospectively permitted acquisitions for a company engaged in an industry for public purpose, even if the particular building for whose construction land was being acquired may not be used for a public purpose. The constitutional validity of the new section was challenged[26] and it was alleged that by the amendment the presumption of public purpose was being attempted to be raised by fiction of law whether it existed in fact or not. Article 31(2) required factual satisfaction of the public purpose requirement hence the statutory provision was unconstitutional. From a plain reading of the section the argument of the petitioner was clearly tenable. The court however in contrast to *Vajravelu* acknowledged that the amendment was introduced in order

19. Art. 300-A provides that "No person shall be deprived of his property save by authority of law". The article was inserted by the Constitution (Forty-Fourth Amendment) Act 1978 enforced from 20-6-1979.

20. See T.K. Tope, "Forty-Fourth Amendment and the Right to Property" 1979 (4) SCC (Jor) 27; P.K. Tripathi, "Right of Property after forty Fourth Amendment—Better Protected Than Ever Before" AIR (Jour) 1980 at 49.

21. See, Baxi *supra* n. 12.

22. On the utilisation of non-justiciability as a legislative technique see legislative drafting *infra*.

23. B. N. Mukherjee and David L. Wilcox, "Development Planning and the Power of Acquisition of Property" in *Law and Urbanization in India* 103 (1969).

24. See paras 1.2 and 1.3, *supra*.

25. *R.L. Arora* v. *State of U.P.*(1) AIR 1962 SC 764.

26. *R.L. Arora* v. *State of U.P.* (2) AIR 1964 SC 1230.

to fill the lacuna pointed out in *R. L. Arora*(1). The new clause thus did not permit acquisitions without public purpose but only introduced a new definition of public purpose, and if acquisitions prior to 20-7-1962 also fell within the new definition they were permissible.

4.4 In *R. L. Arora*(2), the court by some expansive interpretation saved a governmental plan, which due to the communication gap between the executor and the lawmaker, was clearly in jeopardy.[27]

4.5. The *Arora cases* occurred in an era when the government's largess giving activities were not as yet subject to the rigorous discipline of substantive and procedural reasonableness. It may be more difficult for the state to justify today why it prefers one kind of industry over another? Or how it has come to prefer one representative of an industry over another. For in some cases[28] the court has found that grant of government largess is subject to the discipline of article 14 and the court has insisted that the power should be exercised by the government on rational principles by a reasonable procedure. In *Somawanti* v. *State of Punjab*[29] the court held that a notification under s. 6 of the Land Acquisition Act was conclusive evidence of the fact that a land was required and that such land was needed for public purpose. The fact that the government chose to use its acquisition machinery for the setting up of a refrigeration industry in the state instead of permitting the deprived owner to establish a paper industry on the land acquired was a decision totally dictated by the economic priorities of the government.

Now if the facts of *Somawanti* are slightly altered and both the deprived owner and the private company wish to set up a similar industry, on what considerations would the government prefer one over the other? Even if public purpose and governmental satisfaction are not justiciable, the user of the general procedure of acquisition (instead of the special acquisition procedure for companies) would be conferral of a special benefit. Whether such benefit has been conferred on rational considerations by a reasonable procedure is now subject to scrutiny.[30]

4.6. The Supreme Court's perspective on public purpose has consistently been that a government declaration that a land was required for public purpose would be conclusive evidence of the requirement. And except in the case of colourable exercise of power the decision of the government would be beyond challenge. Public purpose declarations were never subjected to the rigorous judicial scrutiny which was accorded to compensation principles. The court did not differentiate and grade various kinds of public purposes. Nor did it forge any kind of linkage between public purpose and just compensation i.e. the nature of public purpose influencing the quantum of compensation being offered. That such a linkage could have strengthened the social justice component of the compensation controversy was neither appreciated by the court nor by the policy makers.[31]

4.7 As the stand of the government to pay less than market value compensation was to some extent dictated by social justice considerations the forging of such a linkage in future acquisition laws may be desirable. As the grant of differential compensation will be linked to the object of social justice, challenges contending infringement of the equality clause (which remains the main plank of challenge for acquisition laws)[32] could be obviated. Also once public purpose and compensation are linked more careful scrutiny of public purpose declarations and grant of special benefits to any individual or group under the public purpose powers is bound to ensure.

C. Post Article 31 *the Legal Right of Property*

5.1. As pointed out earlier the forty fourth amendment substituted the fundamental right of property with a legal right of property. Due to this substitution it may be presumed that the entire analysis of Art. 31 is only of academic interest. It has been pointed out that as article 300A reproduces the language of article 30(1) the interpretation of the court of that part of the article remains of importance.[33] It has also been forcefully contended[34] that the removal of the fundamental right of property has further strengthened the requirements of compensation and public purpose. The fulfilment of these requirements is inherent in the power of acquisition. Till the time that these requirements were incorporated in Art. 31(2) the inherent rights were in abeyance but with the removal of Art. 31(2) these inherent rights revive in full force. Also Art. 300A is drafted

27. For detailed consideration see para 7.3 *infra*.

28. See *Kasturi Lal* v. *State of J. K.* AIR 1980 SC 1992; *Parashram Thakur Dass* v. *Ram Chand* AIR 1982 SC 872; *Ram and Shyam Company* v. *State of Haryana*, 1985 3 SCC 267.

29. AIR 1963 SC 151.

30. See *supra* n. 29.

31. For advocacy of such a linkage see U. Baxi "The Travails of Land Use Planning Compensation and Urbanisation" in *Law and Urbanisation in India*, 153 (1969).

32. See paras 5.2 and 5.3 *infra*.

33. D. D. Basu, *Shorter Constitution of India* 675 (8th edn. 1981).

34. See P. K. Tripathi *supra* n. 20. Also see H.M. Seervai, Constitutional Law of India Vol. 3 at paras 15.A.28; 15 A 34-35 (2nd edn.); for contra see *supra* n. 33 at 675-82.

in a manner similar to Art. 21 and it is not beyond the realm of possibility that it should be contended that the law depriving property must be reasonable and compensation should be an integral component of such reasonableness.[35]

5.2. Though the possibility of such like contentions cannot be overlooked their acceptance remains a point of speculation and controversy. What remains non-controversial is the fact that the law depriving property is subject to the discipline of the fundamental rights. Fundamental rights which are likely to assume importance are enshrined in articles 14 and 21. Even when Art. 31 was a fundamental right, in several constitutional challenges infringement of article 14 was the second principal contention. Infringement of article 14 requirements resulted in the invalidation of some acquisition provisions.[36] Now with the elimination of the fundamental right of property the equality clause will assume great importance.

5.3. Recently in *Chandra Bansi Singh* v. *State of Bihar* when the Government of Bihar acquired a vast tract of land for construction of houses and later after the 1980 general elections the lands of some influential persons were released. The release was held to be violative of article 14 by the court, when the ostensible reason for the order of release was found to be false. Also in a number of recent cases the grant of governmental largess has become subject to the discipline of article 14 and the court has insisted that the power should be exercised by the Government on rational principles by a reasonable procedure.[38]

5.4. By some recent pronouncements the court has found that the right to life includes within it the right to livelihood.[39] The court has also held that the right to life guarantees not just animal survival but a right to a full and meaningful existence.[40] If a single plot of land of an urban worker is acquired without full recompense the right would be activated. Hopefully however with the constitutional commitment to socialism such a course of action would not be adopted even if the right to full compensation has not been constitutionally guaranteed for such acquisition.[41] The fear however is that these pronouncements may also be used when (within ceiling) land of a propertied person is acquired. It can be contended that the right to life connotes the right to live according to one's station in life. And the government's acquisition of land on less than market value (just compensation) infringes the owner's right to life.

5.5. The above stated is by nature of speculation. Such an argument may never be made or if made never accepted. However taken the fact that our courts and advocates have mainly been concerned with the rights of the rich (despite the changed scenario through public interest litigation) and advocacy has had a major influence on decision-making[42] the possibility of such a development should not be dismissed out of hand. It has been said that when the rich fight their forensic battles the poor also gain. The right to life however has developed primarily in cases agitating for better living conditions for the deprived and has been coloured by their life circumstances. It is necessary to guard, that the meagre gains that the deprived have won for themselves do not come to be used by the rich.

III. THE TECHNICAL ASPECTS OF LAW-MAKING

6.1. The foregoing sections concentrated on the substantive aspects of the law of acquisition. However, lawmaking is not just policy but also craftspersonship and technique. And due understanding and appreciation of these technical needs by the policy makers and executors is required if policies have to fulfil the purposes for which they are formulated. This necessitates the involvement of policymakers and executors with the technical aspects of lawmaking. Their divorce from these aspects will in turn lead to a divorce between the form and substance of a law. That is the words or techniques used may inadequately appreciate the purposes for which a law is required and the problems at the ground level faced by the executor.

6.2. This involvement is required both at the stage where the law is drafted and where it is interpreted. The technical input is furnished by draftspersons and the lawyers at these two stages respectively. The forthcoming sections show the extent to which inadequacies in drafting and lawyering have jeopardized governmental policies.

35. For contentions of this nature see T.K. Tope, *supra n.* 20.

36. e.g. Vajravelu *supra* n. 9.

37. 1984(4) SEC 316.

38. See *supra* para 4.5.

39. *Olga Tellis* v. *BMC* (1985) 3 SCC 545.

40. *Francis Mullin* v. *Administrator Union Territory* (1981) 1 SCC 608; *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161.

41. Such a right has been guaranteed to a tiller of soil if his self occupied property is acquired. Vide art. 31A of the Constitution.

42. *see* para 8.2 *infra.*

A. *Legislative Drafting*

7.1. One constant element in legislative drafting that emerges to the fore is the inability to take guidance from judicial decisions on justice and constitutional requirements. In *Bella Banerjee* the court declared unconstitutional anterior date land value fixing and land value freezing. The court at the same time clearly indicated that anterior date land value fixation would be permissible if done in order to avoid speculation in land. The executive failed to correctly read this decision and in *D. Namasivaya* the Madras government not fully realising the purport of the decision went up to the Supreme Court to defend its anterior date land value freezing merely because the objects and reasons to the statute declared that the land value freezing was being done in order to prevent speculation in the land. An imaginative reading of *Bella Banerjee* would have shown that the court only made anterior dating related to the actual time of acquisition permissible in order to curb speculation. And it expected the government to produce carefully gathered factual information of speculation to justify such anterior dating.

7.2. Similarly in *State of M.P.* v. *Vishnu Prasad Sharma*[43] the court had found that successive notifications under s. 6 of the Land Acquisition Act for a locality notified under s. 4(1) were impermissible as it would amount to land value freezing and depriving a person of his property without adequate notice. To the governments plea that where large projects were involved it could not make up its mind all at once[44] the court replied that before the government starts acquisition proceedings by the issue of a notification under s. 4(1) it should have a complete plan of its projects. Such a complete plan the court pointed out was not beyond the resources of the government.

However the government fearing that the large projects already initiated by it may be ordered to be dismantled[45] went ahead and amended the Land Acquisition Act making successive declarations under section 6 of the Act permissible. According to Prof. Baxi[46] this amendment was partly prompted by the fact that the court in parts of its decision focussed on the phraseology of the sections of the Act and pointed out that they made successive declarations impossible. This was perhaps seen by the legislative draftsperson as an invitation to rewrite the section. This could be because the draftsperson and legislator only attend to these interpretational aspects of a decision and the substantive policy guidance that courts seek to offer is ignored.

> "A due regard to the "complete plan" rationale of Vishnu Prasad would perhaps have obviated the need to authorize successive declarations under the Act. For the central assumption sustaining this rationale is that if a plan is "complete plan" it will be possible..... to issue a consolidated declaration under section 6(1). Exhaustion of section 4 notification would pose no problem since no declarations remain to be made."[47]

7.3. It won't be amiss to point out, that where constitutional or statutory amendments are introduced primarily to obviate the effect of a judicial decision the purpose of the amendment should clearly emerge from the statutory amendment objects and reasons for an amendment are looked at by the courts only when the purport of the provision is not clear. And yet in *R. L. Arora* (2) the newly incorporated S. 40(aa) of the Land Acquisition Act was struck down in the minority judgment because on a literal interpretation the section did not validly succeed in doing what it had set out to do. The majority had to take resort to the mischief rule to save the sections validity. That on amendment a statutory provision was not upheld on a literal interpretation is a telling comment on drafting skills.

7.4. Similarly in *Vajravelu* L and Acquisition Madras (Amendment) Act, 1961 was struck down as infringing article 14 because though it provided for acquisition for housing purposes it had a formula of compensation less beneficient than the principal Act. It was contended that the less beneficient formula was adopted because land was being acquired for the purpose of slum clearance. The court did not accept this contention as the Act conferred power to acquire land for housing schemes to the acquisition authorities. If the bonafides of the state's contention is accepted the need for careful drafting is again underscored. For if the motivation of the acquisition law was slum clearance why was it not expressly stated in the statute.

7.5. Vajravelu also brings home the fact that drafting is undertaken without adequately anticipating arguments in court. After all the principle, that if the legislature continues to use in an amended law a word already interpreted by the court, it is to be presumed that the legislature approves the connotation adopted by the court, is oft used. Despite this presumption the fourth constitution amendment which was introduced to discard the just equivalence standard specified in *Bella Banerjee* continued to use the word compensation.

43. *Supra* n. 14.

44. Interestingly the court accepted this contention in *Udai Ram supra* n. 13 and this insistence on complete plan was abandoned.

45. That such apprehension was unfounded see U. Baxi *supra* n. 31 at 163.

46. *Supra* n. 31.

47. *Id.* at 166.

7.6. As the judicial process is not seen as an opportunity for case to case development of legal concepts. Nor are decisions of courts invalidating certain laws seen as an opportunity to reconsider and rethink a legislative policy. Other than the retrospective validation technique frequent use is also made of the tehnique of non-justiciability. The constant user of this technique clearly shows that courts are only seen as stumbling blocks in policy execution and the input that a particular case or fact situation can given to a general policy is openly declared to be neither needed nor desired.

7.7. Even if the effects these techniques have on institutional legitimacy be ignored, their user could be understood if they had succeeded in curbing litigation and ousting the jurisdiction of the court. As it stands whenever the technique of non justiciability has been used the courts have always added a rider to protect their jurisdiction be it colourable exercise of power or mala-fides.

Also when the technique of non justiciability is used the only answer that the government has to an attack on the vires of a provision is that the matter is beyond the jurisdiction of the court. The government has no arguments which make the constitutionality of the impugned provision undisputed even if the court has jurisdiction. By adoption of the technique of non-justiciability the executive fails to acquaint the court with the rationale behind its policies. And the court only aware of the attempts of the executive to oust its jurisdiction interprets the law to protect its powers of judicial review. Thus judicial review rather than the substantive policy influences judicial decisions.

7.8. For instance after the fourth constitutional amendment, which made the adequacy of compensation non-justiciable; whilst litigation on the question of compensation continued full steam, more attention was devoted to determining the effect of non-justiciability. The court did not really move forward from the 'full indemnification' formula evolved in *Bella Banerjee* If the policy makers had entered into a dialogue with the court on the formula suggested by it, the chances were that a viable and fair compensation policy could have emerged from the decisions of the court. As it happened, though litigation was not avoided the decisional process did not furnish any fairness feedback on governmental policies; rather a bitter 'I invalidate you amend game' was only played between the executive and the judiciary.

B. *The Role of Lawyering*

8.1. As we had stated earlier, law is made both when it is legislated and when it is interpreted. Just as a legal draftsperson plays a role in the form in which policies get translated into law; lawyers perform an important function in the manner in which a law is interpreted. In the acquisition context also the functional importance of lawyering in the decisional process comes to the fore.

8.2. In the acquisition context one decision which is an appropriate case study for demonstrating the influence of lawyering is *Vajravelu*. The dichotomy between justiciability and compensation made by the court was primarily counsel dictated. It was Nani Palkhivala who made a distinction between instances where inadequate compensation was provided and where no compensation was provided. The former kind of cases were he contended outside the jurisdiction of the court whilst the latter were still within its ken. The amendment did not permit that parliament could specify principles which render nugatory the formula of just equivalence however slight variations or difference of opinion were non-justiciable. This entire argument was adopted by the court especially as government lawyering did not adequately forestall this ingenous argument and instead used of certain weak arguments[48] which gave an opportunity to the court to brush aside the government case.

8.3. The governments case was primarily mounted on the plank of non-justiciability whether mounted on the fourth amendment or on article 31-A[49] of the Constitution. The fourth amendment argument primarily was that as the legislature disagreed with the just equivalence standard evolved in Bella Banerjee the fourth amendment had been introduced in order to give the legislature a freedom to specify standards different from just equivalence. However, no answer could be offered to the contention that if a departure from the court's delineation of 'compensation' was being made why the term 'compensation' was not replaced with 'money' amount etc.

8.4. On 31-A the government contended that the section as interpreted *K. K. Kochuni* v. *State of Madras*[50] was incorrect insofar as it was laid down that a law was saved by article 31-A only if it dealt with agrarian reform. This ruling the counsel contended was made without perusing that entire objects and reasons to article 31-A. The omitted part supported a wider construction of article 31-A so as to include acquisition of land for slum clearance or other social purposes. The court accepted that in *Kochuni* the objects and reasons for the seventeenth amendment were not considered in their entirety but insisted that it is common place that a court cannot construe a provision on the basis of the statement of objects and reasons. The weakness of

48. See para 8.4 and 8.5 *infra.*

49. This article was introduced by the seventeenth Constitution amendment which provided that laws relating to agrarian reforms could not be challenged on the ground that they infringed arts. 14, 19 and 31.

50. AIR 1960 SC 1080.

the government argument is further demonstrated by the fact that the government was relying on an objective (i.e. slum clearance) which it had itself failed to incorporate in the constitutional article.

8.5. This argument of object and reasons and agrarian reform includes slum clearance was the basis of the minority ruling in *Kochuni*. Now the judges of the minority were not on the *Vajravelu* bench. And the author of the majority opinion in *Kochuni* was heading the *Vajravelu* bench as seniormost judge. In these circumstances, the chances of winning a liberal interpretation of article 31-A were small; the induction of this argument however gave the court a handle with which to brush aside most of the respondent state's arguments.

8.6. The vital role played by legislative drafting and lawyering in the interpretational process brings home the need for a closer interaction between the legislative and litigative departments both for evolving litigative strategies and for drafting laws.

IV. A SUMMING UP OF THE ROLE OF THE COURT IN THE ACQUISITION CONTEXT

9.1. Our analysis of the role of the court in the acquisition context shows that the accusation of 'inhibitor' levelled at the court is not really rooted in facts. It is true that the court has struck down a number of acquisition policies but this invalidation cannot be merely attributed to conservative judicial attitudes it is as much due to the lack of a scientific compensation policy, unimaginative lawmaking and inadequate lawyering.

9.2. Our study also underscores that if urban planners wish to continue to use land acquisition as a mechanism for promoting urban development, town-planning and to regulate land user it is imperative that a viable and scientific law of compensation is framed. A law which fulfils the requirements of the fundamental rights and which adequately balances between individual and social needs.[51] On an ad hoc cost-benefit analysis the earlier compensation policy of offering the minimum amount does not seem beneficial as the acquisition gets litigatively stalled for number of years, the government has to very often pay enhanced compensation and the cost of the project for which the land was sought to be acquired has also increased. Abandonment of the minimum compensation policy seems appropriate. The linkage of the law of compensation with the public purpose for which it is being acquired can be experimented with as a method of balancing individuaul and social interests.

9.3. This study also underscores that urban planners cannot merely be concerned with policy their involvement is also needed with the nitty-gritty of law making. As when it comes to the crunch, it is the form in which a law emerges which ultimately influences its subtantive functioning.

9.4. In this part of our study we were concerned with the response of the court to legislative policies of acquisition. In the next part we concentrate on the policy initiatives taken by the court in an area of vital interest to the urban planner i.e. civic rights. The initiatory role was played by the court with regard to procedural and substantive aspects. However, as the procedural innovations were not evolved in the civic rights context. We will concentrate on the courts initiatives in specific areas of civic rights.

PART II

IV. THE CIVIC RIGHTS CONTEXT

10.1. Civic rights encompass claims for a clean and healthy environment, proper sanitation, good roads and access to communication. The rights of the hawkers to earn their livelihood and of the urban poor to seek shelter are also covered under this head. As the perspective of the court on each of these claims is of vital interest to the urban planner, each of them is being separately examined.

A. *Right to Clean and Healthy Environment*

10.2. This right was first agitated in *Ratlam Municipality* v. *Vardhichand*[52] wherein what was at issue was whether the satisfication of the citizen's civic needs was dependant on the availability of finances with the municipality. And is paucity of funds a compete defence to the municipality's wrong of failing to fulfil its civic duties. The court upholding a Magistrate's order under s. 133 of the criminal procedure code requiring the municipality to construct a proper drainage system held that "the criminal procedure code operate against statutory bodies and others regardless of the cash in their coffers..... Otherwise a profligate statutory body.... may legally defy duties under the law by urging in self defence a self created bankruptcy or perverted expenditure budget."[53]

10.3. The court did not just uphold the order of the Magistrate it also examined and approved a Rs. 6 lakh drainage scheme which was to completed within an year. Other detailed directions on provision of civic needs and improvement of health and hygiene were also issued by the

51. See *supra* para 3.10.

52. AIR 1980 SC 1622.

53. *Id.* at 1628.

court.[54] Thus the court emphasized that civic needs were beyond priorities. They were needs for which money had to be found by the executive. And infringement of civic rights had to be readdressed by affirmative action. Failure of the authorities to honour the redressal directions of the court makes them liable for contempt.

10.4. This imperious tone was absent, when the court accepted, that for people of hilly areas the right to have access to the outside world was an integral component of the right to life[55] When the Himachal Pradesh Government protested against the direction of the High Court asking the superintendent engineer to construct the road upto the petitioners village and to seek funds for that purpose. The court accepted that the setting up of priorities in development and allocating finances was primarily a legislative function. The court could not in view of the budgeting system direct the state to spend on any activity in excess of the sanctioned amount. It was not stated as in *Ratlam* that Part III rights had to be honoured regardless of budgetary provision. In *Umed Sharma* the court clarified that the recommendation for more funds was made in view of the existing legislative recognition of the petitioners needs.

10.5. In *Umed Sharma* in contrast to Ratlam the court sees a more restrictive role for itself. This could be because whereas in Ratlam the court was required to correct a civic wrong of the government, in Umed Sharma the positive content of the right of life was sought to be enforced. For the urban planner, the message is that whereas in the settling of development priorities and allocation of benefits the court may be slow to intervene. Yet in functioning as a grievance airing forum, for the ignored sections of the populace court actions, would raise serious legitimacy questions on the plans finalised. And where the planners omissions don't just impede improvement in quality of life but lead to actual deterioration active intervention and redressal from the court can be predicted.

10.6 Of interest to planners are also *B. K. Srinivasan* v. *State of Karnataka*[56] and *Sachidananda Pandey* v. *State of West Bengal*.[57] In the former the court has underscored the point that once land use plans and regulations were made the promulgating authorities were as much subject to them as the ordinary citizen. Thus if the regulations of Bangalore City required that in a certain area buildings higher than 55 feet could not be built. The municipal authorities could not contrary to these regulations issue licences allowing higher construction.

Sachidanand Pandey shows that when the government shows sensitivity to environmental issues and makes due provision for them the court will refuse to intervene. Thus when the West Bengal Government granted licence for building a five star hotel on land where part of the Calcutta zoo was situated but made alternative provision for the zoo buildings, adopted measures[58] to protect arrival of migratory birds, the executive decision was upheld.

10.7. *B. K. Srinivasan* and *Sachidanand Pandey* are also indicators of the future patern of litigation in the field of urbanisation. Once vacant land in major urban centres reduces in size it is change in land user rather than acquisition which will raise controversies. These cases augur greater vigilance by citizens of their civic rights. Thus necessitate realization by the authorities of their accountability for decisions taken in public interest.

B. *Hawking a Right or an Impediment*

11.1. Hawking on pavements of major cities has been seen as a major impediment to orderly pedestrian movement by town planners. Thus nearly all municipal enactments contain provisions prohibiting or severely restricting this right. The attitude of the Supreme Court is an important input to the planner for framing future plans especially now when the right to livelihood has been recognized by the court and a number of petitions by various hawker unions are pending before the court.

11.2. Do the hawkers have the right to carry on their business on the pavements? If yes then will they not be interfering with the real utility of a pavement which is to provide a safe pathway for the pedestrian to walk on. If not then what are those sections of the community to do for a living who cannot afford to buy or rent shops. Also should hawkers be totally eliminated, when in selling overheads exempt goods (which are cheaper than shop sold goods) they are providing an essential service to the low buying power consumer. It is in the context of these dilemmas that the court and the urban planner have to answer the question of hawking. The response of the court has evolved over the years from total prohibition to

54. It required Ratlam Municipal Council to take statutory action to prevent effluents from the alcohol plant to flow into the street. To construct public latrines and to provide scavenging and water services for them. The state government was required to instruct the malaria department to prevent mosquito breeding.

55. *Umed Sharma* v. *State of H.P.* 1986(1) SCALE 182.

56. 1987(1) SCALE 142.

57. 1987(1) SCALE 311.

58. The government required that the hotel was to be a medium rise building. It was to use no bright lights on its portions and a green belt was to encircle the hotel.

regulated permission. The court has not accepted that the citizen has a fundamental right to carry on hawking but neither has it found it possible to treat claims of such a right with total disdain.

11.3. In one of the first cases[59] where the right to street trading was claimed before the Supreme Court the court dismissed the contention as preposterous and pointed out that the litigation had occurred only because the NDMC permitted trading on public streets. As the court did not consider that the hawkers had any right it did not consider that any equities had to be settled. It refused to accept the contention of the petitioner that he could be removed from his pavement site by the NDMC only if an alternative trading place was provided.

11.4. However, more than a decade later when the Bombay Hawkers Union[60] claimed hawking as a fundamental right the court pointed out that the right to hawk as the right to carry on other trades and businesses was subject to reasonable restrictions in the interest of the general public. No right to do trade or business so as to cause nuisance, annoyance or inconvenience to the members of the public could be claimed. Public streets insisted the court were meant for the user of the general public and not to facilitate the carrying on of private trade and business. Though the court in *Bombay Hawkers* had an opinion similar to *Pyarelal* with regard to the purpose of public roads. It did not as in *Pyarelal* look askance at the hawkers claim nor did it insist as in Pyarelal on total removal of the hawkers. Rather it supervised the compromise entered into between the hawkers and the municipality which entailed the creation of hawking and non hawking zones. The conditions under which hawking could be carried were scrutinized for reasonableness. As a result the condition prohibiting sale of cooked food was struck down and the hours of hawking were extended.[61] The court also issued guidelines[62] for exercise of the power to create non-hawking zones.

11.5. From *Pyarelal* to *Bombay Hawkers* the court's perspective towards street trading has altered from total prohibition to regulated permission. The change can be explained on two hypothesis. One that in the eighties after reading the right to livelihood in the right to life the Supreme Court has become more sensitive to the rights of the deprived sections. And two that the hawkers in *Bombay hawkers* came to the court as a union, in *Pyarelal* the petitioner was almost a lone voice. As the hawkers have emerged as a power centre their claims have to be balanced with those of the general populace. The hawkers rights can no longer be totally negatived before the rights of the general public.

11.6. The second hypothesis should also influence city planners thinking on the question of hawking. Also if city planners desire to keep their road clear of hawkers they need to understand and tackle the root causes of hawking. Police measures can no longer be successfully used to tackle the problem.[63] Nor can such measures depend upon unequivocal support from the Supreme Court.

C. *The Pavement Dwelling Question*

12.1. Inadequate development of the rural sector and concentration of job opportunities in the city results in converging of rural settlers into cities. Wherein house scarcity and availability of employment opportunities in city centres only leads to squatting and pavement dwelling. Pavement dwelling and squatting are often referred to as the urban planners major problems. Problems which occur largely because the benefits of urbanisation are not equitably distributed. Are pavement dwellers rejects and deviants of society or are they members of those deprived sections whose interests have too long been ignored by society? Do they have any constitutional claims which merit recognition by our lawmakers and law enforcers. Or should law enforcers be only concerned with police measures to curb such encroachments? With these many facets, the complex question of the constitutional rights of pavement dwellers came to be considered by the Supreme Court in *Olga Tellis* v. *BMC*.

12.2. This case raised the query whether the state had the right to remove pavement dwellers without providing them alternative accommodation? The petitioners contended that squatting was a direct result of governmental inaction, maladministration and inadequate planning. If the government was allowed to evict these

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59. *Pyare lal* v. *Delhi Municipality* AIR 1968 SCC 133.

60. *Bombay Hawkers Union & Ors.* v. *Bombay Municipal Corporation* (1985) 3 SCC 528.

61. Other conditions which were upheld were that (i) hawking was to be carried on 1 × 1 metre footpath; (ii) No stalls handcarts etc. to be used; (iii) hawking prohibited 100 m from place of worship, hospital, educational institution and 150 metres from municipal or other market; (iv) No noise was to be made to attract customers; (v) to co-operate with municipal and other authorities and (vi) daily fee confers no right to do business over particular place.

62. By guidelines required municipal commissioner (i) to create one hawking zone for two contiguous municipal wards; (ii) had discretion to fix non-hawking zone in consultation with Bombay municipal corporation; (iii) in hawking zone licence to do business on payment of fee should be permitted though discretion in interest of public health, sanitation and convenience to extend non-hawking zone; (iv) hawking licence should not be refused except for good reason and (v) before altering scheme should take into confidence all public interests.

63. (1985) 3 SCC 545.

dwellers it would be allowed to take advantage of its own wrong. Further pavement dwellers could not be characterised as trespassers because they lived on pavements due to economic compulsions. The state was under obligation to provide necessities of life to these dwellers and the court has power to issue directions to the state to promote and protect their right to life.

12.3. The court however did not take up the invitation of the petitioners. It insisted that the pavement dwellers had to vacate the footpaths as the safety of the pedestrians could not be sacrified in order to accommodate persons who used public properties. The court not only ordered eviction it also did not require that alternative accommodation should be provided prior to eviction. Though the right to livelihood was held included within the right to life the court did not consider that such right entitled persons to live on pavements near their places of employment.

12.4. The considerations of public order prevailed over the claims of public justice in the decision. However, as the case had been argued in the scenario of the housing, employment, industry location, urban planning and rural development policies of the government; the court could not (despite the decision) view pavement dwelling only as a public order and safety problem. It thus enjoined the government to launch housing and employment schemes. It accepted that forcible eviction of squatters even with resettlement totally disrupted the economic life of the household. Further if squatters were forcibly ousted they sold their plots and returned to their original sites.

12.5. The decision in *Olga Tellis* went in favour of the municipal authorities but the psychological pressure exerted by the misery of the pavement dwellers loomed large over the mind of the court. We, therefore, think that urban planners need to work beyond police measures if the problem of squatting is to be tackled. For though the police power approach of the state received the approval of the court in *Olga Tellis* that a similar result will necessarily ensure in the future cannot be predicted with certainty.

V. CONCLUSION

13.1. In contrast to the acquisition context in the civic rights litigation it is not the propertied rich citizen who has moved the court. It is rather the inarticulate section of society which has found in the court a forum to voice its grievances. As the litigant is the public, seeking recognition of the oft quoted public interest. The messages for the planners from this class of litigation are different from those of the acquisition agitation.

13.2. Our analysis shows that these public spirited individuals require fulfilment not of the formal but the substantive logic of the Constitution. They desire that urbanisation policies should be so framed as to allow a full and meaningful life to all persons. A life where livelihood is protected, where the environment is clean and unpolluted, where shelter is granted to all. If the government fails to fulfil these basic needs then the unintended effects that follow such as hawking squatting etc. should not be viewed only from a policing perspective but from the social justice angle. The contentions of the petitioners have not been unqualifiedly accepted by the court but these claims and the urban planners civic rights policies have been scrutinised on the constitutional touchstone. The message that this litigation holds for the urban planners is that constitutional principles should be the guiding spirit for evolving and finalizing urban policies. Failure to so sensitize their policies may not just jeopardize their plans but also entail serious legitimacy costs for them.

13.3. The need to move the court for affirmative action and grievance articulation is primarily felt when the legislature and the executive fail the people. If these non-judicial forums are imbued by the spirit of social justice (rather than public order) the need for the court to intervene will correspondingly reduce. Especially when the other forums are institutionally better equipped to fulfil these social justice needs. Though the fact, that the court can and may so intervene, should be seen as a spur and not an impediment to state affirmative action.

Municipal taxation of property

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12—258 M. of Urban Dev./ND/88


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MUNICIPAL TAXATION OF PROPERTY

I. INTRODUCTION

1.1. With rapid urbanisation, more and more public services have to be provided to citizens in urban areas. Sooner or later, the burden of providing these public services comes to fall upon the local authority constituted for the area concerned. Services need finances. Finances can come only from sources which are legally available and economically capable of being exploited. For most local authorities, these sources are either grants by the Government, or taxes levied by the local authority or revenue from productive activities carried on by the local authority. Grants by the Government cannot be too liberal. The scope for productive activities (i.e. profit-making activities or enterprises) that can be taken up by local authorities, is limited. Even where profits can accrue from such undertakings, e.g. undertakings concerned with local transport, production of electricity, supply of water and the like, there are also reasons of policy, restricting the quantum of profits that can be earned by local authorities from commercial activities. The major part of the finances of local authorities in India is therefore contributed by taxes. And, of the total amount of revenue earned by an urban local authority from taxes, a pretty large portion comes from property taxes.[1-2]. It has been stated that property tax is an important tax for municipal government, in the same way as income tax is to Central Government and State Government.[3]

1.2. Thus, property tax is the major source of local taxes, and it is desirable that its impact, incidence and effects on municipal finances and municipal administration should be kept under systematic review. Some of the aspects concerning this tax have a legal genesis. The present study deals with those aspects.

1.3. Municipal Government in India covers five distinct types of urban local authorities[4]:—

(a) municipal corporations;
(b) municipal councils;
(c) notified area committees;
(d) town area committees;
(e) cantonment boards.

Municipal corporations and municipal councils are fully representative bodies. The notified area committees and town area committees are either fully or partly nominated bodies. Cantonment boards are created under the Cantonments Act, 1924 (a Central Act) and consist of partly elected members.

Municipal corporations deal directly with the State Government, whereas municipal councils, notified area committees and town area committees, deal with the State Government through the district officer. Cantonment boards are supervised by the Union Ministry of Defence.[5]

1.4. It appears that reliance of local authorities on tax resources is more in the larger cities, than in the smaller ones. In particular, metropolitan cities rely on tax revenue for over three quarters of their ordinary income. For the other municipalities, this proportion is only about 55 per cent. However, this does not mean that when one is dealing with intensive urbanisation and its impact, taxation has a lesser importance as regards municipal bodies other than municipal corporations. Urbanisation is bound to bring more and more cities into the category of "metropolitan" cities, consequentially increasing the importance of tax revenues.

1.5. An analysis of the income of 29 municipal corporations[6] for the year 1978-79 shows, that of the revenues of those corporations, 75.39 per cent is tax revenues. The various taxes, contributing to tax revenue comprise the following :—

(1) Property.
(2) Services.
(3) Octroi.
(4) Terminal.
(5) Trades and callings.
(6) Animals and vehicles.
(7) Tolls.
(8) Miscellaneous.

1. See Planning Commission, Task Forces on Housing and Urban Development, Paper Part II, Financing of Urban Development, pages 11, 12, 16, Tables 1.1 to 1.4 and Appendix Table 1.1, (Dec. 1983).
2. See, further, paragraph 1.6, *infra*.
3. E. S. Reddy, "Role of Property Tax in Local Finance" 43 *Quarterly Journal of Local Self-Government Institute* at 3-11, (1983).
4. *Supra* n. 1 at page 1, para 1.1.
5. *Id.* 4, para 1.18 and page 12, Table 1.4.
6. *Supra* note 1 at 49, para 3.3 and page 58, Table 3.2. See also para 2.7, *infra*.

1.6. Of the total tax revenue of municipal corporations, the percentage share of each category of tax for the year 1978-79 (for 23 municipal corporations) has been given as under[7] :—

(1) Property	28·40
(2) Services	19·08
(3) octroi	37·66
(4) Terminal	5·45
(5) Trade and calling	1·45
(6) Animals and vehicles	1·03
(7) Tolls	0·02
(8) Miscellaneous	6·90
	100·00

1.7. It is evident from the above sample figures[8] that property tax is an important source of revenue for corporations.

II. CONSTITUTIONAL AND LEGAL POSITION

2.1. Under the Constitution, the States can, in theory, confer on municipal authorities, powers on any matter in the State List or in the Concurrent List for the purpose of local self-government. In practice, however, only a few of the functions are so delegated. Again, so far as taxation goes, the States can, by appropriate legislation, empower local authorities to impose any tax mentioned in the State List.[9] These include taxes on agricultural income, succession duty on agricultural land, estate duty on such land, *taxes on lands and buildings* (entry 49), taxes on mineral rights, duties of excise on certain goods, *taxes on the entry of goods* into a local area for *consumption, sale or use therein* (entry 52), taxes on the consumption or sale of electricity, taxes on the sale or purchase of goods other than newspapers, taxes on advertisements (other than advertisements published in the newspapers or broadcast by radio or television), taxes on goods and passengers carried by road or on inland waterways, taxes on vehicles (whether mechanically propelled or not) suitable for use on roads, *taxes on animals and boats* (State List, entry 58), tolls (State List, entry 59), *taxes on profession, trades, callings and employments* (State List, entry 60), capitation taxes, taxes on luxuries, including taxes on entertainments, amusements, betting and gambling and rates of stamp duty on certain documents. In practice, however, only a few of these taxes are delegated to the local authorities. A few State enactments[10] do empower the local authorities to levy any tax which the State legislature can impose, but his general power conferred by the State enactment does not appear to have been made use of, so far.

2.2. In practice,[11] the taxes levied by local bodies in urban areas are the following:—

(1) Property tax.
(2) Service tax.
(3) Octroi.
(4) Terminal tax.
(5) Tax on trades and callings.
(6) Tax on animals and vehicles.
(7) Tolls.
(8) Miscellaneous taxes.

Though octroi is being gradually abolished, Property tax remains an important component of the taxation structure.

2.3. State control over municipal taxation[12] takes place in the following forms :—

(a) control over the imposition of a new tax[13] by a local body;
(b) state approval of tax rates;[14]
(c) requirement of sanction for reduction or abolition of tax.[15]

2.4. Imposition of a new tax by a municipal body generally requires approval of the State Government. Assuming that a tax is permissible under law by a municipal body,[16] its imposition requires—

(i) a resolution by the municipal body;
(ii) a notice inviting public objections to the proposed tax; and
(iii) a reference to the State Government, along with the objections received on the proposal in response to the notice issued by the local body.

2.5. Fixation of maximum or minimum rates of tax also generally requires sanction of the State Government to the rates proposed by the municipal body.

7. *Id* at 49, para 3.4 and page 61. (There appears to be a slight mistake in the figures as given in the paper. The total of the 8 item comes to 100.09 per cent).
8. Para 1.6, *supra*.
9. Constitution of India, Seventh Schedule, State List, entries 46-63.
10. E.g. the U.P. Municipal Corporations Act, 1959.
11. See S.1, *supra*.
12. *Supra* n. 1 at 10, para 1.44.
13. Para 2.4, *infra*.
14. Para 2.5, *infra*.
15. Para 2.6, *infra*.
16. Para 2.1, *supra*.

2.6. Besides this, the abolition or reduction of a tax already being levied by a municipal body generally requires the following formalities to be undergone :—

(a) sanction of the State Government (in the case of certain corporations);

(b) information to be given to the State Government, e.g. in the States of Andhra Pradesh, Kerala and Tamil Nadu;

(c) notification in the Gazette (e.g. in Madhya Pradesh).

2.7. A survey of the structure of revenue receipts of sample municipal bodies was conducted, a few years ago, by the National Council of Applied Economic Research, New Delhi. The figures for the year 1976-1977, as given in the Survey mentioned above (for corporations) can be restated in the following form[17] :—

Corporations: Revenue Receipts	
Tax Revenue . . .	72·33 per cent
Non-tax Revenue . .	9·87 per cent
Contributions . . .	5·37 per cent
Grants	8·22 per cent
Miscellaneous . . .	4·21 per cent
Total .	100·00

In the same Survey[18], the corresponding figures for 1976-1977 for Municipalities (not being Corporations) have also been given, which can be restated in the following form :—

Municipalities : Revenue Receipts	
(a) Tax Revenue . .	58·43 per cent
(b) Non-tax Revenue .	7·04 per cent
(c) Contributions . .	12·13 per cent
(d) Grants . . .	10·26 per cent
(e) Miscellaneous . .	12·14 per cent
Total .	100·00

It will be seen from the above Tables that the proportion of tax revenue to the total revenue receipts is higher (72.33 per cent) in the case of Corporations than in the case of other Municipalities (58.43 per cent).

III. PROPERTY TAX: THE PRESENT STRUCTURE

(a) *Nature of tax*

3.1. Of the various taxes leviable by municipal corporations, the tax on property, popularly known a house tax, is the one that deserves intensive attention for a variety of reasons. In the first place, this is a tax which contributes a major slice of the tax revenues of most corporations in the metropolitan areas. Secondly, as a matter of fact, this tax has been levied for a long time in the majority of urban areas governed by municipal corporations in India. Thirdly, it is this tax which has received considerable attention in the past few years, and yet, is one which has so far eluded satisfactory and acceptable action for reform.

3.2. Property tax is a levy on land and buildings. It is among the most important sources of revenue to local authorities. All the Municipal Acts in India have provisions on the subject. In terms of technical language, it is a tax on land and buildings, though in practice, it is described as property tax. The constitutional authority for its levy is entry 49 of the State List which authorises the State Legislature to levy a tax on land and buildings; and it is by virtue of this authority that State Legislatures have enacted legislations, or rather, inserted statutory provisions in municipal enactments, authorising municipal corporations to levy such a tax, subject to compliance with the statutory procedure.

3.3. There has been some theoretical discussion about the precise nature of the property tax. The debate has been thus summarised, in one of the studies[19] :—

> The question has often been raised whether the property tax is to be looked upon as a user charge for services rendered or as a tax proper. The most plausible answer is that it partakes of both. As a tax, it has to be levied, as far as possible, in accordance with ability to pay. And ability to pay can be attributed only to individuals, or institutions reflecting the ability to pay of individuals owning them. As a service charge, 'the property tax' must be imposed on the basis of the cost of service, at least the basic services, provided by the municipal bodies and enjoyed by the assessee.

3.4. Whatever be the correct theoretical categorisation of property tax, it appears that it is regarded by many as the ideal form of local taxation. The approach is generally sought to be supported by the following reasons :—

(a) The tax is demanded from persons who have some proven capacity to pay and who, at the same time, can be taken as benefiting from the most important of the services provided by the local bodies.

(b) Amongst all the productive taxes that are locally leviable, this tax has the least

17. *A Study of the resources of Municipal Bodies:* National Council of Applied Economic Research, New Delhi, Table III-9 (1980). See also para 1.6 *supra.*

18. *Ibid.*

19. *Supra* n. 1 at 51, para 3.20. See also para 3.26 *infra.*

"spill-over" effect. It falls largely on the owners or occupiers of houses and old residents who use services provided by establishments owning or renting property in the concerned city. Of course, to the extent that property tax is shifted by the businesses in the particular city which export their products, a part of the tax may be said to have a spill-over to other areas. But this possible spill-over is less in quantity than the spill-over in the case of alternative taxes like octroi or local income-tax.

(c) The property tax has been levied for a very long period in India[20] and (it appears) in other parts of the world as well. Thus, it is stated that in the United States, property tax accounts for nearly 88% of the total revenue of all local Governments and 70% of the total revenue of municipalities.[21] The property tax seems also to have been in vogue in the United Kingdom and other Commonwealth countries. The base for taxation in most countries, it appears, is the annual value, the property being assessed on the annual value of land or building.[22]

3.5. Due to the popularity, ambiguity and universality of property tax, it has attracted sufficient attention at the hands of writers on economic, public finance and local Government. There have also been a few court decisions on the subject in India. Apart from that, the main task which has faced students of the subject has been an examination of the appropriate base of the tax and the possibility of reform therein, so as to make the tax productive in its yield and progressive in terms of economic theory, both being aspects which, among themselves, cover a variety of matters. Thus, at the stage of levy of the tax, the issues that have received attention concern efficiency, equity, revenue yield, cost and certainty. As regards the stage of actual assessment, the issues that can or should receive attention relate to delays and inequities in assessment, question of re-assessment, problems of recovery, procedure for collection, machinery for assessment, possibility of centralised assessment process and the role of the State in the assessment process. Of course, the aspect that has received the most intensive and extensive attention is that of the base of the tax, namely, whether the tax should be on the annual value or on the capital value of the property and if it is to be on the annual value, what should be the method of determining the annual value ?

3.6. The present system of property tax in India seems to have a long history, dating as far back as 1850.[23] An Act of 1850 authorised voluntary associations in towns to raise funds for meeting municipal service charges. It seems that there was a provision in the Act for revising the assessment of the rental value once in five years. However, in the absence of a proper assessment authority, the practice was to accept the rent receipts granted by the landlords to the tenants as the basis of taxation.[24] Moreover, there was considerable difficulty in assessing self-occupied properties. With the emergence of municipalities and the establishment of true local self-government, the relative State enactments authorised the municipal bodies to levy specified taxes, including property tax. However, problems of effective recovery, balanced against equitable assessment of the tax still remain and seem to be likely to remain with us for some time.

(b) *Basis of Taxation*

3.7. Property tax in India is, in most States, based on the annual rental value of the land and the buildings standing on it. The "annual rental value" itself may be based either on the actual rent which the owner receives for the premises, or on a "reasonable" rent which a hypothetical tenant may be expected to pay for the premises to the owner, with deductions for repairs and maintenance. In the case of buildings which fall under the purview of rent control legislation, the standard rent fixed by law is taken as constituting the criterion for annual rent. Provisions exist to provide concessions to owner-occupied residential premises and to allow remissions to places of worship, schools and other public premises. Every building is assessed along with the parcel of land on which it stands.[25]

(c) *Capital Value*

3.8. In some States, it appears, the annual letting value is not the test employed for levying property tax and other tests have been adopted. Thus, in the Andhra Pradesh Municipalities Act, 1965, there are separate provisions for assessing rented properties and owner-occupied properties. Rented properties are assessed on the basis of their annual value. Owner-occupied properties are assessed on their

20. Para 3.6, *infra*.

21. F. Durr, *The Urban Economy* (Index Education Publishers, Scranton) 112,113(1971), cited in Abhijit Datta (ed.), *Property Taxation in India*, 14(1983).

22. Ursula Hicks *Development from Below : Local Government and Finance in Commonwealth Countries*, chapter 16 (Clarandon Press, Oxford 1961).

23. Rama Rao "Some Problems of the Property Tax" in Abhijit Dutta (Ed.) *Property Taxation in India* 1 , 5 (1983).

24. V. Venkata Rao *A Hundred Years of Local Self-Government in the Andhra and Madras States* 1850 *to* 1950 (All India Institute of Local Self-Government Bombay) chapter 1 (1969).

25. Venugopal, "Towards an Expanding Property Tax Base" in Abhijit Datta (Ed.) *Property Taxation in India* 14 15 16, (1983).

capital value.[26] The annual value itself (in the A.P. Act) is to be determined "in such manner as may be prescribed, having regard to the rent received in respect thereof". But it is not to exceed the fair rent/standard rent, if already fixed under rent control legislation.

The Gujarat Municipalities Act, 1963 also provides for "capital value" as an alternate basis of assessment.

3.9. In the Andhra Pradesh Municipalities Act,[27] norms and restrictions are also laid down for determining the capital value of the building used or occupied by the owner. The "Capital value" is the total of the estimated value of the building (including the land appurtenant to the building), arrived at after detailed valuation with reference to the prevailing market rates for the different materials used. In calculating the capital value, depreciation may be allowed, depending on the condition and age of the buildings. The maximum depreciation allowed depends on the age of the building, as indicated in a Table on the subject.[28] [In addition, some rebate is allowed].

3.10. In the Andhra Pradesh Municipalities Act, 1965, for arriving at the cost of building, rates of cost per square metre of plinth area are laid down. For this purpose, buildings are statutorily classified on the basis materials used (such as mud walls, brick walls, brick walls in cement, metal sheet walls, stone walls in mud, stone walls in lime and cement mortar, steel frame structures and R.C.C. frame structures). The valuation officer has to obtain a certificate regarding the classification of the building from the engineering staff of the municipal council.

3.11. It may be added that under the Andhra Pradesh Act of 1965, the rules require[29] the Valuation Officer to ascertain the capital value of the land, which is the prevailing market value. The "market value" is the reasonable price that the property may secure if it is sold in the open market, having regard to its situation, present condition and value as a prospective site for house construction or as a prospective site for the location of mills, factories or other industrial or commercial concerns. The Valuation Officer is also expected to have regard to the price paid for the land or for any portion thereof in the current year and, in case such price is not ascertainable the average price, prevailing in the three years immediately preceding, after making due allowance for the lapse of time and for difference in respect of the situation of the land or of the amenities in the neighbourhood. The Valuation Officer may also obtain, through the Secretary of the Council, particulars regarding all lands which were valued by the Registration Department in the current year and in the immediately preceding three years for requisition purposes or for the assignment or sale of house sites belonging to the Government. The rate of capital value adopted in each such case may be taken as a general guide in making valuation of adjoining lands.

The Secretary of the Municipal Council may, in his turn, also obtain from the District Registrar or Sub-Registrar particulars of the transfer of property for sale in the preceding quarter and provide such information to the Valuation Officer for determining the value of the land.

3.12. An important provision in the Andhra Pradesh Municipalities Act, 1965, applicable where property tax is levied on the basis of capital value, is that only two per cent of the capital value of the land so determined should be taken as the tax of the land.[30]

(d) *Annual rental value*

3.13. Coming to the details of the levy of property tax on the basis of annual rental value, the most important aspect to be noted is that in most enactments, the annual rental value is expressed in terms of the rent at which the property can be "reasonably" expected to be let out. By virtue of a series of decisions of the Supreme Court,[31] the criterion is the realisable measure of standard rent determinable under the Rent Control Act. The reasonable rent cannot be determined independently of the Rent Control Act. This principle applies—

(a) not only where the standard rent has been already fixed,

(b) but also where no standard rent has been fixed within the prescribed period, and

(c) also where the building is self-occupied.

3.14. It should be pointed out that the application of the criterion of standard rent (for fixing annual rental value for property tax) is not totally new. The test was applied as far back as 1924 by the Rangoon High Court,[32] holding that "in the absence of special circumstances, the Corporation of the city of Rangoon must take as its basis of assessment of buildings and land for fixation (of annual rental value), the standard

26. M. K. Balachandran, "Legal Aspects of Property Tax Reforms" in Abhijit Datta (Ed.), *Property Taxation in India*, pages 53, 54, 55 (1983). See, further, para 3, 9 *infra*.

27. Y. Ramaswamy, "*Uniformity in the Valuation of Properties*" in Abhijit Datta (Ed.), *Property Taxation in India*, pages 24, 32, 34, 35 (1983).

28. Table 3.1. [Tables are at the end of the section].

29. *Supra* n. 27 at 24 & 34.

30. *Ibid.*

31. *Diwan Daulat Rai Kapoor* v. *N.D.M.C.*, A.I.R. 1980 S.C. 541, 550. See also para 3.17, *infra*, and para 3.18 *infra*.

32. *Municipal Corporation of the City of Rangoon* v. *Surati Bara Bazar Co. Ltd.*, A.I.R. 1924 Rang. 194.

rent in those cases in which standard rent has been fixed by the Rent Controller. In other cases, it must fix the rateable value on a consideration of all the surrounding facts and circumstances, including the effect that the Rangoon Rent Act has or may have on the matter."[33] The Rangoon court further emphasised the penal provision in the Rent Act and observed : "The landlord, the standard rent having been fixed by the Controller, could not reasonably expect to get any higher rent for the premises. Did he attempt to do so, he would be guilty of an offence for which he would be liable to a heavy fine."[34]

3.15. The Bombay High Court [35] took a different view in the matter and held that it is permissible to ignore the standard rent in fixing annual rental value for property taxation. The figure of annual rental value is the "value of the beneficial occupation to the tenant."[36] The Madras High Court[37] also held (with reference to section 82 of the Madras District Municipalities Act 1920) that municipal authorities are not bound to take the fair rent fixed under the Rent Control Act as necessarily the rent for which the premises may reasonably be expected to be let out within the meaning of section 82. The High Court added that fixation of fair rent is, to a certain extent, artificial and hypothetical and may not necessarily represent the rent at which premises could be reasonably be expected to be let during the year of assessment to property tax.

3.16. The Calcutta High Court,[38] however, in a case decided in 1957, agreed with the Rangoon view.[39] Interpreting section 127(a) of the Calcutta Municipal Act, it held that in determining the annual value of a building under that section, the Municipal Corporation of Calcutta was bound by the standard rent fixed by the Rent Controller under the West Bengal Rent Act. The word "reasonably" in section 127(1) of the Calcutta Municipal Act was interpreted as connoting "legally". As a holding cannot be *legally* let out at a rent higher than the standard rent, any rent in excess of the standard rent cannot be said to be the rent at which the building might "reasonably be expected to let." The High Court applied the above reasoning and also stressed the fact that if voluntary payment and acceptance of any rent in excess of the standard is prohibited by statute, the rateable value cannot be fixed at a figure higher than the standard rent.

3.17. The Calcutta judgment mentioned above[40] was upheld by the Supreme Court,[41] which held that the criterion for determining the annual value was the rent realisable by the landlord, and not the value of the holding in the hands of the tenant. The Supreme Court pointed out that it would be incongruous to consider fixation of rent beyond the limits fixed by penal legislation as "reasonable". The precise reasoning of the Supreme Court is indicated by the following points from its judgment :-

(i) A contract for rent at a rate higher than the standard rent is not only enforceable, but is also punishable. One may legitimately say that under these circumstances, a landlord cannot *reasonably* be expected to let a building for a rent higher than the standard rent.

(ii) A law of the land with penal consequences cannot be ignored in ascertaining the reasonable expectations of a landlord in the matter of rent.

(iii) In determining the gross annual rent, statutory limitation of rent circumscribes the scope of the bargain in the market and, therefore, in no circumstances, the hypothetical rent may exceed the limit.

The above principle was applied to a fact situation where the standard rent had been actually fixed. In a later decision,[42] the Supreme Court extended the principle to a fact situation where, though the standard rent had not been fixed actually, it was common case that the standard rent was statutorily determined at a particular rate.

That the principle was not confined to cases where the standard rent had been actually fixed was re-affirmed in 1971 by the Supreme Court.[43]

3.18. In a judgment rendered on December 20, 1979, the Supreme Court held[44] that the annual value of a building governed by the Delhi Rent Control Act, 1958 must be limited by the measure of standard rent determinable under that Act. In the above case, it was sought to be argued by the New Delhi Municipal Committee that as the period of limitation for making an

33. *Id.* at 200.
34. *Id.* at 199.
35. *Gulam Ahmed* v. *Bombay Municipality*, A.I.R. 1951 Bom. 320.
36. *Id.* at 327.
37. *Madurai Municipality* v. *Kamakshi Sundaram Chettiar*, A.I.R. 1956 Mad. 49.
38. *Corporation of Calcutta* v. *Padma Debi*, A.I.R. 1957 Cal. 466 at 470.
39. Para 3.14, *supra.*
40. Para 3.16, *supra.*
41. *Corporation of Calcutta* v. *Padma Debi*, A.I.R. 1962 S.C. 151 at 153; (1962) 3 S.C.R. 49. See also para 3.13, *supra.*
42. *Corporation of Calcutta* v. *L.I.C.*, A.I.R. 1970 S.C. 1417.
43. *Guntur Municipal Council* v. *Guntur Town Rate Payers Assn.*, A.I.R. 1971 S. C. 353.
44. *Dewan Daulat Rai Kapoor* v. *NDMC*, A.I.R. 1980 S.C. 541 at 550.

application for the fixation of fair rent had expired, the landlord could recover contractual rent from the tenant and should pay tax on that base. But the argument did not find favour with the Supreme Court. It observed that :—

> [t]he *existing* tenant may be liable to pay the contractual rent to the landlord, but the *hypothetical tenant* to whom the building is hypothetically to be let would not suffer from this disability created by (the) bar of limitation and he would be entitled to make an application for fixation of the standard rent at any time within two years of the hypothetical letting and the limit of the standard rent determinable under the Act would therefore inevitably enter into the bargain and circumscribe the rate of rent at which the building could *reasonably* be expected to let.[45]

3.19. The Supreme Court further pointed out that "when the Rent Control legislation provides for fixation of standard rent..... it does so because it considers the measure of the standard rent prescribed by it to be reasonable."[46]

(e) *Net impact of judgments*

3.20. The net result of the above judgment[47] (read with previous judgments of the Supreme Court) is that for the purpose of the property tax levied under municipal laws on the basis of annual value, (a) the annual letting value is limited by the measure of the standard rent (i) determined or (ii) determinable, on the principles laid down in the Rent Act (wherever applicable) and (b) it cannot be computed on the basis of the actual rent received by the landlord, if the actual rent exceeds the hypothetical standard rent.

3.21. The impact of the Supreme Court judgment interpreting the meaning of "annual rental value" can be conveniently understood, if one classifies taxable buildings into following categories :—

(i) buildings to which the Rent Control Act applies, and for which the fair rent has actually been fixed under such Act;

(ii) buildings to which the Rent Control Act applies, but for which fair rent has not been actually fixed under such Act and;

(iii) buildings which are outside the purview of the Rent Control Act.[48]

For buildings in the first category, the fair rent *actually* fixed under the Rent Control Act has to be taken as the Annual Rental Value.

For buildings in the second category, the fair rent *notionally* fixed by the Rent Control Act will become the Annual Renting Value, even if the fair rent has not been actually fixed so far, and even if the statutory time limit for applying fixation of time limit at the instance of the tenant has actually expired. This is the position, even if the actual rent received exceeds the notional fair rent.

For cases in the third category, fixation of the annual rental value is an open issue and the matter is in the judgment of the competent valuation authority.

3.22. The above paragraphs deal with the principal bases of property tax as at present in force. It may be convenient now to refer to a few other aspects concerning administration of the property tax.

(f) *Procedural aspects*

3.23. The procedure for valuation and assessment of property tax as prescribed by the legislation is, generally comprised of the following stages :[49]

(a) Preparation of Valuation and/or assessment lists ;

(b) Periodical revision of Valuation/asessment lists ;

(c) Validation of valuation/assessment ;

(d) Grant of exemptions and remissions ;

(e) Modifications/alterations in the assessment list ; and

(f) Appeals.

3.24. In some states (Assam, Bihar, Orissa and West Bengal), valuation and assessment lists are prepared separately while, in other states, valuation and assessment are combined in one list.

The authority appointed for valuation varies from state to state. In some states, the list is prepared by officers appointed by the council. In some states, assessors are appointed by the state Government.

In some states, the executive officer of the municipal body is incharge of assessment/valuation. The position can be conveniently stated in a tabular form.[50]

45. *Id. at* 550.

46. *Id. at* 551.

47. *Supra* note 44.

48. See G.V. Ramakrishna, "Municipal Property Tax" in Abhijit Datta (Ed.), *Property Taxation in India*, para 83 (1983)

49. See D. D. Malhotra, "Organisation of Property Tax" in Abhijit Datta (Ed.), *Property Taxation in India* at 138, 140 &, 151 (1983).

50 Table 3.2.

3.25. General revision of the valuation of property is provided for in most municipal enactments. But the periodicity of revision varies from state to state. The periodicity of revision can be conveniently stated in the form of a Table.[51]

3.26. Local bodies in India enjoy only delegated power for raising taxes. The levy of property tax by local authorities in India owes its legal authority to the following sources :—

(a) Constitution, 7th Schedule, State List, entry 49, "Tax on lands and buildings", thereby rendering it legally permissible for the state legislature to levy the tax; and

(b) enactment passed by the State Legislature in exercise of the constitutional authority mentioned at (a) above, authorising the local body to levy a tax on land and buildings.

Being a tax on immovable property, it cannot cover furniture, fixtures or machinery.

Usually[52] the tax is a combination of general house tax and traditional service charges for water, lighting and drainage.

3.27. Most municipal enactments also provide an elaborate procedure for its "Validation". This involves :—

(a) issue of public notice for inspection of the list ;

(b) Inviting objections against entries therein;

(c) hearing of objections; and

(d) authentication of the list.

The objections are to be heard by the competent authority. The authority competent for the purpose varies from state to state and the position may be set out in the form of a Table.[53]

3.28. Exemptions and remissions in respect of property tax are generally granted, either by the Municipal Act or by the municipal body under statutory authority for special reasons. The exemptions granted usually apply to :—

(a) particular parts of municipal areas (the exemption being from water, drainage or lighting tax, where the relative service is not provided by the municipality);

(b) particular person or class of persons (e.g. on the ground of poverty or special hardship); and

(c) particular classes of property (e.g. property whose annual value does not exceed the specified amount)

(d) unoccupied property.

Generally, the grant of exemption or remission requires prior approval of the State Government.

3.29. Between one general revision and another, it may become necessary to modify the lists. Such a necessity may arise by reason of the following changes concerning or affecting the building :—

(a) revision of the rate of taxation effected after preparation of the last assessment list (or after last revision) ;

(b) change of ownership of the building after preparation of the assessment list (or after last revision) ;

(c) construction of new buildings ;

(d) re-construction or alteration of, or addition to the building after preparation of the assessment list (or after its last revision) ;

(e) demolition or destruction of the building ;

(f) error or omission in the valuation ;

(g) general improvement in the locality (in some States—e.g. Bihar); and

(h) increase in rent (in some States—e.g. in Madhya Pradesh—the landlord must inform).

Municipal enactments generally make provisions for modification in the list, on the above grounds or on most of them.

3.30. The authority competent to effect modification in the assessment list (between two general revisions) varies from state to state. The position can be indicated in the form of a Table.[54]

3.31. An appeal against an order of the revising authority (that is, the authority which hears objections against general revision of the assessment list before authenticating it) is generally provided for in municipal enactments. Similarly, these enactments allow an appeal against alterations or modifications of assessment list made between two successive general revisions. The appellate authority also varies from state to state, it may be the council, a judicial officer or an executive officer. Details of the position in this

51. Table 3.3.

52. See Pratap Singh, "Property Tax Administration in Urban Local Bodies" in Abhijit Datta (Ed.), *Property Taxation India*. 221, (1983). See also para 3.3, *supra*.

53. Table 3.4.

54. Table 3,5.

regard are set out in a separate Table.[55] [In Assam, Bihar and West Bengal, there is no appeal against the revising authority].

3.32. In some States (Madhya Pradesh, Uttar Pradesh, Rajasthan, Gujarat, Maharashtra, Orissa, Andhra Pradesh, Karnataka, Tamil Nadu and Kerala), one of the important conditions necessary to be satisfied before the appellate authority can entertain an appeal is that the amount claimed should be deposited by the applicant. In Assam, no application for review is to be entertained unless the applicant has paid all dues to the municipal council other than the sum which has been enhanced through revaluation or re-assessment. In Haryana and Himachal Pradesh, however, the requirement is that all other municipal taxes due upto date should be paid before preferring an appeal. In West Bengal, the payment of the tax *based on previous assessment* is the only pre-requisite condition for review of the valuation and assessment.

3.33. The above brief resume enables one to make two general observations about the machinery of assessment. In the first place, the broad structure of machinery of assessment is similar in all the states. Secondly, there are some differences from state to state, in respect of details of the machinery[56] of assessment as regards (a) the preparation of valuation and assessment lists, (b) periodical revision of valuation/assessment lists, (c) validation of valuation/assessment, (d) grant of exemptions, (e) modifications/alterations in the assessment test, (f) appeals (i.e. appellate authorities and requirement of deposit of tax before entitlement of appeal).

TABLE 3·1

Maximum depreciation allowed in fixing capital value of buildings in Andhra Pradesh[57]

Age of the building	Maximum depreciation allowed
Below 2 years	Nil
Above 2 years and below 5 years	5 per cent
Above 5 years and below 10 years	10 per cent
Above 10 years and below 15 years	15 per cent
Above 15 years and below 25 years	25 per cent
Above 25 years and below 35 years	30 per cent
Above 35 years and below 50 years	40 per cent
Above 50 years	50 per cent

TABLE 3·2

Officers appointed for preparing Valuation/Assessment Lists[58]

Authority entrusted with assessment	States
1. Council	Haryana, Himachal Pradesh and U. P.
2. Assessors appointed by the Council	Assam, Rajasthan and West Bengal.
3. Assessors/valuation officers appointed by State Government	Andhra Pradesh, Karnataka, Orissa. (In Orissa, till valuation officer is appointed, the Executive Officer performs the task).
4. Executive Officer	Bihar, Gujarat, Kerala, Maharashtra, Madhya Pradesh and Punjab.

TABLE 3·3

Periodicity of Valuation of Property Tax[59]

Periodicity	States
1. Three years	Rajasthan
2. Four years	Gujarat, Karnataka, Madhya Pradesh, Maharashtra,
3. Five years	Andhra Pradesh, Assam, Bihar, Haryana, Kerala, Orissa, Tamil Nadu, Uttar Pradesh and West Bengal.

55. Table 3.6.
56. Para 3.23, *supra*.
57. *Supra* note 27 at 24 & 32. Also see para 3.9, *supra*.
58. Para 3.24, *supra*.
59. Para 3.25, *supra*.

TABLE 3·4

Authorities hearing objections to Valuation/Assessment.[60]

Competent Authority	State
1. Municipal Council or authority nominated by it	Assam, Haryana, Himachal Pradesh, Madhya Pradesh, Rajasthan and U. P.
2. Special Committee	Bihar, Gujarat, Punjab and West Bengal.
3. Valuation Officer/Assessor	Andhra Pradesh, Maharashtra and Orissa.
4. Executive Officer	Kerala and Tamil Nadu.
5. Revising authority	Karnataka.

TABLE 3·5

Authority competent to modify the Assessment List[61]

Competent Authority	State
1. Municipal Council	Assam, Haryana, Himachal Pradesh, Madhya Pradesh, U. P. and West Bengal.
2. Special Committee or Executive Committee	Gujarat and Punjab.
3. Executive Officer	Andhra Pradesh, Bihar, Karnataka, Kerala, Maharashtra, Orissa and Tamil Nadu.

TABLE 3·6

Appellate authorities in various States[62]

Revising authority	Appellate authority	States
1. Council or its committee, whose decision is final	..	Assam, Bihar and West Bengal.
2. Council or its committee or special committee	(a) District Magistrate/Collector/ Deputy Commissioner.	Haryana, Himachal Pradesh, Punjab, Rajasthan and U. P.
	(b) Civil Judge	Madhya Pradesh.
	(c) Judicial Magistrate	Gujarat and Maharashtra.
3. Municipal Commissioner or Assistant Commissioner appointed by the Government for this purpose	Magistrate designated for this purpose.	Karnataka
If there is no municipal commissioner, it is the Executive officer or Valuation officer	(a) Council/special officer appointed by State Government for this purpose.	Kerala.
	(b) Appellate Commissioner (appointed by the State Government) in consultation with chairman of the council).	Andhra Pradesh.
	(c) District Magistrate	Orissa.

IV. DEFECTS OF THE PRESENT SYSTEM

4.1. The present system of levying taxes on property has been subjected to criticism from various quarters and some of the points of criticism should be noted at this stage.

4.2. Generally, the property tax is assessed on the capital or annual value of land or rented property respectively. In the case of the former, the capital value of a property is taken as the basis of taxation, while in the case of the latter, the hypothetical value of rent of the property is taken into account. It has been said that in a sense, both the bases are spurious and unscientific, because, in both the cases, evidence and correct information are not available.[61] It has also been pointed out that there is a defect in the assessment of the tax,

60. Para 3.27, *supra.*

61. Para 3.30, *supra.*

62. R. N. Tripathy, *Local Finance in a Developing Economy* (*Planning Commission*) at 138, 139 (1967) reerred to Abhijit Datta (Ed.), *Property Taxation in India* at 1, 6 (1983).

Supra n 23 at 1.

which is one of the main bottlenecks impairing its elasticity and productivity. Historically, false statements by tenants or landlords resulted in large scale reduction in property tax, and according to some critics, the situation is no better, even as it is at present. Thus, it has been said that both under-assessment and over-assessment are prevalent in a number of municipal areas. A study made in the context of municipalities in Bihar observes that very often, in the case of persons with a substantial holding of property but with a large local influence, the annual value is under-assessed, whereas holdings owned by people with small income, though the holdings may be very small in size and in bad condition physically, are over-assessed.[62] Incidentally, this situation has also been put forward as a ground for the creation of a "Central Valuation Agency" for assessing property tax.[63]

4.3. Another aspect to which attention has been drawn is that of revision and re-valuation of property. It has been pointed out that revision of the assessment lists for property tax is not being done systematically. Developmental activities in a local area may stimulate a rise in the property values, as well as an increase in the number of buildings. But revision of property tax, it has been said, does not keep pace with this rise or increase.[64] Another point of view expressed is that revaluation of property itself presents practical problems. It is difficult to estimate the real market value of any property. When a property is sold, its true market value is established with a large degree of certainty. But such transactions are few and far between. Again, while it may be true that when one property is sold actually, the appreciation in value so revealed would be applicable to other properties in the neighbourhood also. But this assumption is also not accurate, as no two properties are strictly the same.[65]

4.4. While many of these general points may apply to all modes of property taxation, some objections have been made in respect of the test of annual letting value or annual rateable values specifically, i.e. to adopting it as the basis of assessment of property tax. Essentially, the annual rateable value is a *hypothetical* test. The following analysis made by a foreign writer has been quoted in an Indian study to demonstrate its hypothetical character :—[66]

> "The rent prescribed by the statute is a *hypothetical rent*,—as hypothetical as the tenant. It is the rent which an *imaginary tenant* might be reasonably expected to pay to an *imaginary landlord* for the tenancy of the dwelling in that locality, on the hypothesis that both are reasonable people, the landlord not being extortionate, the tenant not being under pressure, the dwelling being vacant and to let, not subject to any control, the landlord agreeing to do the repairs and pay the insurance, the tenant agreeing to pay the rates, the period not too short, not too long, simply from year to year."

4.5. Apart from the fact that the concept of free market rent is hypothetical,[67] one practical problem which has arisen by virtue of the statutory formula usually adopted in municipal legislation (where it deals with the annual rateable value) is this. Generally, the annual value or the annual rateable value is defined in terms of the fair rent or standard rent of the premises. The applicable rent control legislation may either actually fix the rent or may notionally do so. Now, because of the use of the adverb "reasonably" in the definition of annual rateable value in property tax legislation, the court have held that in determining the gross annual rent, the statutory limitation of rent circumscribes the scope of the market. The result is that the hypothetical rent envisaged by property tax legislation[68] cannot exceed the limit of rent permissible under rent control legislation[69] wherever such legislation is in force. As rent control legislation is in force in all urban areas, this is a substantial objection.

4.6. Because of the above difficulty, one suggestion made is that the question should be examined whether it would not be legally permissible to charge property tax on the basis of actual rent, where actual rent exceeds the rent permissible under the rent control legislation.[70]

4.7. Having regard to the fact that judicial interpretation of property tax provisions incorporating the criterion of reasonable rent has imposed a restraint as mentioned above, suggestions have also been made to de-link the annual letting value for property tax purposes from rent control legislation. Thus, the rural urban relationship committee of the ministry of finance recommended a specific provision being made in all municipal Acts "that the

63. *Supra* n. 23 at 1 & 6. Also see para 13.6 *infra*.

64. *Id.* at 1 & 7.

65. *Supra* n 25 at 14 & 15.

66. Holland, *Assessment of Land Value* (University of Wisconsin Press) (1970) quoted in Abhijit Datta (Ed.), *Property Taxation in India* at 118, 122 (1983).

67. Para 4.4, *supra*. Also, see para 5.2 *infra*.

68. Para 4.4, *supra*. Also, paras 3.13 to 3.18 *supra*.

69. *Compare Corporation of Calcutta* v. *Padma Devi*, A.I.R. 1952 S.C. 151 and other decisions cited in S. 3, *supra*.

70. *Supra* n. 26 at 53 74 7.

valuation shall be made on the basis of annual rent at which property is reasonably expected to be let on the actual rent, *whichever is greater.*"[71]

4.8. Apart from revising the rateable value formula, there have been made, from time to time, suggestions to totally abandon the basis of annual rental value or annual letting value and to adopt some other alternative basis. Some of the suggestions made in this regard will be considered in the next few sections.

V. POSSIBLE ALTERNATIVES

5.1. Keeping in mind the criticism levelled against the present system of municipal taxation of property the next step is to consider the possible alternatives.

5.2. The first possible alternative is to adopt, for the assessment of property tax, a basis other than that of annual letting value, the latter being the test currently in force in most urban areas in India. Criticisms levelled against this test have been already touched up on in the preceding section,[72] but it may be useful to re-state the main points here, in brief. Critics have in mind two principal defects of the test of "annual letting value" as the basis of property taxation. The first objection may be said to be a theoretical one, or an objection based on logic. "Annual letting value" (it has been said) is a purely hypothetical or imaginary concept.[73] Even the notion of "hypothetical tenant" is an imaginary one and it becomes still more unrealistic when one comes to the amount of rent. No one can arrive at the figure of rent at which premises may be "reasonably expected to be let".

The second objection to the test of annual letting value is based on the developments that have taken place in practice. Judicial decisions have construed the expression "annual letting value" in conjunction with fair rent or standard rent. This has led to the position that the figure of rent comes to be circumscribed; and this is so, even where—

(a) the Rent Controller has not yet fixed the rent of the premises; or

(b) the premises have been actually let out at a rent much higher than the fair or standard rent (whether the standard rent is fixed notionally or actually).

5.3. Several alternatives to the test of annual letting value have been proposed by various writers. Some of these will be considered in detail later.[74] However, at this stage, it may be convenient to enumerate some of the important alternatives. These are as under :—

(a) levying the tax on the bais of the *capital* value of the premises;

(b) levying the tax on the basis of certain *physical* characteristics of properties—what has been called the *"area"* basis of valuation;

(c) levying the tax on the basis of *site value* of the premises; and

(d) levying the tax on the basis of *plinth.*

5.4. Since independence, there have been four major reports of the Central Government on the subject of, or covering the subject of, property tax as levied by municipal bodies.[75] These are—

(a) Local Finance Inquiry Committee, Report (1951);

(b) Taxation Enquiry Commission, Report (1955);

(c) Committee on Augmentation of Financial Resources of Urban or Local Bodies (Zakaria Committee), Report (1963); and

(d) Rural Urban Relationship Committee, Report (1966).

5.5. There have also been[76] a number of State Level Municipal Finance Commissions which have examined the financial requirements of local bodies in the respective States. Alphabetically, these are as under :—

(a) Andhra Pradesh (1976);
(b) Gujarat (1964 and 1972);
(c) Karnataka (1975);
(d) Kerala (1976);
(e) Maharashtra (1974); and
(f) U.P. (1969 and 1974).[77]

5.6. Another possible course, without changing the present criterion of "annual letting value" would be to retain the present criterion, but to make possible improvements (of a substantive character) in point of tax

71. *Report of the Rural Urban Relationship Committee*, Ministry of Health and Family Planning, 97 (1966).

72. Section IV, *supra*.

73. See para 4.4, *supra*.

74. Section VI, *infra*.

75. See Rakesh Mohan, "Indian Thinking on Property Tax Reform" in Abhijit Datta (Ed.), *Property Taxation in India*, 118 at (1983).

76. *Supra* n. 17.

77. *Supra* n. 75 at 119.

structure.[78] The modifications to be considered could, of course, also take note of the complications created by linking the annual letting value with controlled rent.

5.7. Apart from a discussion of questions relating to the basis of levy of tax (i.e. the choice between annual letting value, capital value and other parallel criteria), one could also examine the question how far it is possible to widen the base of tax.[79]

5.8. Finally, there may be scope for an examination[80] of the question how far the machinery for assessment and realisation of property tax could be tightened, so as to make it more effective without losing the quality of justice.

VI. SUBSTITUTION OF ANOTHER BASIS FOR LEVY OF TAX : CAPITAL VALUE

6.1. Of the various possible alternative bases for the levy of property tax that fall for consideration, the first that can be taken up is that of capital value, because it is the one that has been most frequently canvassed. Capital value is generally considered to be that value which a *willing seller* could be expected to receive from a willing buyer, if the property were offered for sale free of encumbrances and on reasonable terms.[81] The concept here is the price of the property under a regime of a freely competitive market.

6.2. It has been stated that the capital value of a property is the present value of the "discounted stream" of its expected income and therefore theoretically in a situation of equilibrium.[82] There is no *conceptual* difference between the two bases of assessment (capital value and annual rental value). But, in reality, there is considerable uncertainty surrounding the future—*and especially so, in situations of relatively rapid urbanisation.* Moreover, in conditions of high and variable rates of inflation, there can be considerable difference between the present value of the "discounted stream of annual rentale",[83] based on current rentals and the current capital value.

6.3. Several advantages have been claimed for capital value as the basis of property tax. The advantages, as put forth, not only try to show a tax on the basis of capital value as a smoother and more efficient and more easily enforceable tax, but also take us beyond the narrow sphere of tax administration and affirm that the economic structure as a whole would also gain by adopting the criterion of capital value. The following principal advantages have been claimed for the basis of capital value tax administration.

(a) *Advantages to the taxation system*

(i) Capital value makes a more correct estimate of economic importance and, therefore, of the taxable capacity of the owner—a point made by Gyanchand.[84] The reason is this. Rental value is the *current* or (at the most) the average of several years. But selling prices (which constitute the major factor in determining the capital value),[85] take into account not only the present rent which the property commands, but also the market expectation of future rents which can be foreseen from the expected development of the property or the neighbourhood.[86]

(ii) Vacant land would be easier to tax on the system of capital value (because the basis would not be linked with letting value).[87]

(iii) It would be possible to form an elaborate valuation code,[88] under the system of capital value.

(iv) The valuation rolls prepared for the purpose of wealth tax levied by the Central Government can be profitably used by local bodies.[89]

(v) Rental values, if available, can be capitalised as corroborative evidence to capital value.[90]

(vi) If evidence of sales of property is difficult to get, there would be available an alternative test for arriving at the capital value, namely, the cost of replacement of the building, minus depreciation or obsolescence.[91]

(vii) It would be more difficult to evade taxation.

78. Section X, *infra.*
79. Section XI, *infra.*
80. Section XII, *infra.*
81. *Supra* note 75 at 118—120. See, further, *infra.*
82. *Id.* at 122 & 123.
83. Para 6.1, *supra.*
84. Gyanchand, Local Finance in India 103 (1947), cited in Abhijit Datta (Ed.), *Property Taxation in India*, 1, 2 (1983).
85. See para 6.1, *supra.*
86. Ursula Hicks, Public Finance pages 1, 2 (1967) cited in Abhijit Datta (Ed.), *Property Taxation in India*, 1, 2 (1983).
87. *Supra* n. 75 at 118 and 123.
88. *Id.* at 118 & 127.
89. *Supra* n. 23 at 1 & 2.
90. *Ibid.*
91. *Ibid.*

(b) *Advantages to the economy as a whole*

(viii) *Provided there is frequent re-assessment,* property taxes levied on the basis of capital value would be more buoyant with rising capital values. To the extent that property taxes get capitalised, the rising value of land and property would be slowed down if indeed the basis was capital value and there was frequent re-assessment.[92]

(ix) Since vacant lands would be easier to tax [see point (ii) *supra*], this would lead to more efficient land use.[93]

(c) *Disadvantages of adopting capital value test*

6.4. As against this, there are several disadvantages in adopting capital values as the basis of taxation of property.

(i) In situations of relatively rapid urbanisation, there is considerable uncertainty surrounding the future.[94]

(ii) Capital values are influenced by cyclical fluctuations. They rise in a period of prosperity and fall in a period of depression. Hence they are less accurate than rental value (current income).[95]

(iii) Moreover, capital values are more difficult to assess correctly than annual values. The price of a recently sold land may not be good indicator of the values of other properties in the neighbourhood. Every property has its advantages, and the advantages with which a property is endowed leave their mark on its true value. To quote Lady Ursula Hicks,[96] "For this reason, an element of *judgment* enters into the valuation which is absent from annual valuation, at least where there is widespread rent control and this leads to uncertainty and loss of objectives."

6.5. It has been stated[97] that in a country where the renting of land and building is a normal practice, it would be better to apply annual rental value rating. "One can argue from the British experience itself that in a country where good rent evidence was normally lacking, the adoption of the British system of rating would be unwise." For this reason, it has been stated in a developing country, it is normally more advantageous to use a capital value base.[98]

6.6. It is also stated that the developmental value of property is reflected in the assessment based on market selling prices. The valuation of owner-occupied property is more truly in accordance with real values, than is the case with assessment on an annual value basis and the actual valuation in these cases would give rise to fewer difficulties. The system (of capital value) is thus particularly suitable where there is a larger proportion of free-hold property.[99]

6.7. As against this, one should note that the test of annual letting value is a test familiar to most local bodies in India and, if with some improvements, it can be bettered, then that would be a smoother course than the test of capital value.

6.8. It may be mentioned that the Taxation Enquiry Commission,[100] after an examination of the pros and cons, came to the conclusion that the test of annual rental value of residential and rented buildings (which form a major proportion of the buildings in towns and cities) is simpler than the determination of their capital value. The Commission also expressed the view that the capital values of properties fluctuate to a more significant extent than the rental values. The levy of the tax on the basis of actual or reasonable rent is a levy on actual or potential income and, to that extent, is more equitable than a method of taxation based on capital value. Accordingly, the Taxation Enquiry Commission recommended that the annual value, based on the rent at which properties may reasonably be expected to be let, should continue to be the normal basis for the levy of property tax, subject to capital value being adopted in suitable cases.

6.9. On a consideration of various aspects of the matter, it would appear that while there is something to be said for adopting the test of capital value, the case for abandoning the present test of annual letting value and changing over to a new and unfamiliar one has not been conclusively established. Some advantages of capital value system notwithstanding, it cannot be denied that the opinion of learned economists is not unanimously in its favour and there is a shade of opinion which would still favour the adoption of the annual letting value test.[101] Some of the writers in Western coun-

92. *Supra* n. 75 at 118 & 123.
93. *Supra* n. 75 at 118 & 123.
94. *Ibid.*
95. J. P. Picard, Changing Urban Land Uses as Affected by Taxation (Urban Land Institute, Washington), 30 (1962) cited in Abhijit Datta (Ed.), *Property Taxation in India*, 1, 3 (1983).
96. *Supra* n. 86.
97. Sir John Hicks, *Essays in World Economics*, 240 (1959).
98. *Supra* n. 22 at 357.
99. New Sources of Local Revenue, Royal Institute of Public Administration, Study Group Report, 68 (1956) cited in Abhijit Datta (Ed.), *Property Taxation in India*, 1, 4 (1983).
100. *Report of the Taxation Enquiry Commission*, Vol. 3, Ch. 3, 343 (1953-1954). See also para 11.8, *infra.*
101. Contrast para 6.4 with 6.3, *supra.*

tries have expressed the opinion that in countries which are developing and in which the holding of land freehold is the general pattern, the test of annual letting value may not be satisfactory, particularly where the evidence of rent in a satisfactory form is not forthcoming.[102] With reference to this objection, it would be pertinent to point out two salient features of the changing economic pattern in India which seem to reduce the force of this objection. In the first place, it will not be long before India will cease to be a "developing" country and will become a developed country. Secondly, with the growing rate of urbanisation, the proportion of freehold ownership of land and buildings in the overall picture of the country as a whole will not increase. That proportion may even decline in the not distant future. The above objection will therefore lose much of its force in the course of time in the Indian context.

In other words, if some of the deficiencies of the system of annual letting value can be remedied, it would be worthwhile to retain that system, with the needed modifications. The modifications needed will be considered in due course, in later sections[103] of this study.

VII. AREA AS THE BASIS OF TAX

7.1. Another possible alternative to the criterion of Annual Renting Value is a system of tax based on area measurements.[104] In this system, the tax rate is envisaged to vary, according to different zones in which the city is to be divided for switching over to the new system and also according to the location of properties at ideal points (like major roads, parks and so on). Additional cess is envisaged on non-residential uses. Surcharges are also envisaged, depending upon zonal characteristics, so that property taxes serve urban development objectives also.

7.2. The system of area-based taxation described above[105] is designed with three broad objectives in mind—

(i) It is an important and elastic source of increasing revenue for meeting the increasing costs of civic services.

(ii) It is to serve as an effective instrument of promoting desirable land use and Floor Area Ratio, in the various zones of the city. [The tax rate is to vary, not only according to zonal variations and land users, but also according to the different slabs of Floor Area Ratio].

(iii) It will simplify assessment procedure, by doing away with periodic assessment. The first assessment is based on data plans and revision of the same is undertaken only when building modifications are carried out.

7.3. (a) It should, however, be pointed out that serious doubts have been expressed as to whether these objectives can be achieved in practice.[106] The first objective (elasticity)[107] may clash with the third objective (dispensing with periodic assessment).

(b) Regarding the second objective (promoting urban development), it is stated that tax on land and buildings separately, with slab system related to be achieved FAR in buildings, is an amalgamation of area based tax and site-value tax. Now, it is an acknowledged weakness of the site-value tax that it does not help the full utilisation of land in built-up localities, where buildings happen to be old and were not initially constructed according to a prescribed FAR. Hence, a tax on properties not having the desired FAR may prove to be a penal tax, resulting in the transfer of property to richer sections of society. It is only in newly planned localities that it may serve the objective of urban development and control of land use.

7.4. The Operations Research Group[108] conducted, a few years ago, a study of the property tax system in Madras and made some proposals for rationalisation. The main objectives of the study (and of the resultant proposals) was to immunise the property tax system from its susceptibility to subjective considerations and anomalies in the valuation of properties of various types and sizes. A number of "objective indices" was proposed, on the basis of which the tax was to be calculated. According to physical and functional characteristics of various localities within a city, they were to be classified. On the basis of zonal characteristics and the size and type of buildings in each zone, a zonal rent per square foot of floor area was to be worked out, which must reflect the market rent for similar size and type of properties. Starting with the "zonal index" (i.e. the standard rate for each zone), individual properties are to be assessed on the basis of their deviations in terms of size and other factors. These deviations (peculiar factors) are themselves to be catalogued and indexed.

102. Para 6.5, *supra.*

103. Sections XI-XIII, *infra.*

104. Gangadhar Jha, "Area Basis of Valuation for Property Tax" in Abhijit Datta (Ed.), *Property Taxation in India*, pages 106—108 (1983).

105. Para 7.1, *Supra.*

106. *Supra* n. 104 at 106 & 108.

107. Para 7.2 *supra.*

108. *Property Tax System in Madras Urban Agglomeration* 23. Operations Research Group (1979).

7.5. (a) The essence of the "Standard Zonal Rate" criterion,[109] envisaged by the Operations Research Group appears to be to determine the value of the property with reference to the *market rent*. But the market rent itself is to be determined, not with reference to—

(i) actual rent as charged;

(ii) controlled rent, as permitted by rent control legislation; or

(iii) reasonable rent fixed hypothetically.

The market rent is to be determined (as stated above)[110] with reference to physical and functional zones of the city (and certain further characteristics). Objectivity for this criterion is claimed on the basis of the following reasoning, as put forth in the Operation Research Group Study. The range of variation in the market value of a property per unit area basis within a homogenous zone is much less, compared with the range in the market value of individual properties spread over the city and its outlying areas.

(b) Apart from objectivity as claimed for the test of "Standard Zonal Rate" system, it is also stated that the tax takes into account special features of the property also. These special features may be—

(i) positive, e.g. excessive floor area and luxury fittings; or

(ii) negative, e.g. sub-standard properties or properties without basic municipal facilities.

(c) Periodical revision of the Standard Zonal Rates is also envisaged, so as to keep the rates up to date.

7.6. There is, however, an important dilemma with which one is faced, when one expresses a preference for objective criteria for arriving at the value of immovable properties.

(i) If the objective criteria are too numerous, then the assessment of tax becomes a complex process, thereby causing practical hardships.

(ii) If the factors (i.e. the component indices) are too sketchy, then the assessment becomes unsatisfactory and unrealistic (as not reflecting the true economic value of the property) and also inequitable (for the same reason).

The complexity mentioned at (i) above is likely to recur every time the assessment is revised—periodic revision being a part of the scheme as envisaged.[111]

7.7. Apart from the objection that the inclusion of too many indices may tend to increase the scope of subjectivity and the number of anomalies, there is another serious difficulty with a scheme of "standard zonal rate". The zonal tax rate will be determined with reference to market rent. But market rent (for each locality) will still have to be determined. No doubt, each locality-wise, there will be variations in market rent. But how to determine the central matrix—i.e. what may be called the master "market value"—with reference to which the variations will be operative, is a question that will still remain.

7.8. There is another objection—this time, of a constitutional nature—to the concept of "Standard Zonal rate".[112] The zonal rate has to be based on a rational classification and the qualitative and quantitative factors proposed to be adopted as component indices have to be rational—each one of them. Otherwise,[113] as happened in a case which went upto the Supreme Court, the tax may be invalidated on the ground that the charging section violates the equality clause of the Constitution. The Kerala Act was invalidated by the Supreme Court as it made no attempt at a *rational* classification of buildings, and the legislature had not taken into account other factors, such as the nature of the construction, the location of the buildings, the class to which the buildings belong and the purpose for which they are used. Hence the test of plinth area was struck down.[114]

7.9. No doubt, one can say that these objections are not insurmountable and that they can be avoided, if the indices (component factors) are devised with care, so as to secure rationality. This may be theoretically possible, but it is not easy to assert with certainty that this or that component index will be regarded as "rational" by the courts. If even one of the components adopted is by law declared to be unjustifiable, then the entire scheme may fall to the ground.

7.10. An alternative approach in theory would be to change the basis of assessment to "floor area base". But the difficulty is that the adoption merely of floor area as a test, without taking note of other factors affecting the economic value of property, is definitely unconstitutional.

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109. para 7.4, *supra*.

110. *Ibid.*

111. Para 7.5(c), *supra*.

112. Para 7.5, *supra*.

113. *State of Kerala* v. *Haji K. Kutty Nana* , A.I.R. 1969 S.C. 378 [para 7.11(IV) *infra*.]

114. *Infra* para 7.11.

7.11. This is manifest from a series of judicial decisions rendered in the past on such legislative measures. Here are a few of them :—

(i) The adoption of the method of computing rental value on the basic of floor area, where the Act had provided for assessment only on rental value or capital value, is void.[115] By prescribing such a method, the municipality "not only fixed arbitrarily the annual letting value which bore no relation to the rental which a tenant may reasonably pay, but rendered the statutory right of the tax payer to challenge the valuation, illusory."[116]

(ii) The flat rate method,[117] according to floor area can be applied, only where the majority of the properties are so nearly alike in character, as to be regarded as identical for rating purposes. Applies indiscriminately, it is sure to give rise to inequalities. The Municipal Corporation of the City of Ahmedabad had imposed property tax on the petitioner (Manek Chowk Mills) on the basis of a flat rate per 100 square feet of the floor area of the petitioner's property, as also of all other textile mills, factories, universities buildings etc. The buildings were further divided into (i) buildings used for processing, and (ii) buildings used for non-processing. Monthly rentals for these two classes were calculated on *floor area basis,* but at different rates. The Supreme Court held that the classification was irrational. Further, it did not agree that there was any basis for dividing the factories (and the buildings thereof) into two general classes, as buildings used for processing and non-processing.

(iii) The Mysore Buildings Tax Act, 1963, charging tax on the basis of floor area, was declared[118] to be unconstitutional, as a cow-shed and a cinema hall with equal floor area would bear the same tax burden under such a criterion. The High Court observed : ". . . . . The floorage basis is not only unscientific, it is something arbitrary and mechanical. It does not conform to any of the known principles of taxation."[119]

(iv) The Kerala Buildings Tax Act, 1961 imposing tax on the basis of floor area, was held to be void,[120] on the ground of inequality by the Supreme Court which observed.

"The legislature has not taken into consideration in imposing tax, the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation. They have adopted merely the floor area of the building as the basis of tax, irrespective of all these considerations. Where objects, persons or transactions essentially dissimilar are treated as similar by the imposition of a uniform tax, discrimination may result, for, refusal to make a rational classification may itself in "some cases operate as a denial of equality."[121]

7.12. All in all, the constitutional objections to a method of computing property tax on the basis of area alone are difficult to surmount.

VIII. SITE VALUE AS THE BASIS FOR TAXATION

8.1. It is also proper to consider site value tax. Site value tax is a form of property tax under which the value of land alone is taxed. Its rationale is that increases in land value are attributable to public investment in developing the area, and are not due to an individual's effort. Therefore, society should, in taxes, capture a part of the socially created value.[122]

8.2. Site value tax (SVT) seems to have a long history.[123] Under this system, it is the site value of land alone which is taxed and not the built-up property. The tax is arrived at, after collecting the following information.[124] :—

(a) capital value of the land on which tax would be assessed; and[125]

(b) the rate of site value tax (SVT) to be applied (to the capital value as so ascertained).[126]

8.3. For arriving at the capital value of land for SVT, it is necessary to shorten the "amortisation" period for land, as the subject of SVT is to hasten building activity.[127] This is in contrast with 20 years period followed under property tax as generally levied.

The basis is *current market value* of the land, and not its paid-up cost.

115. *Lokmanya Mills Barsi* v. *Barsi Borough Municipality*, A.I.R. 1961 S.C. 1358.
116. *Id.* at 1360.
117. *Manek Chowk Spg. & Wvg. Mills* v. *Municipal Corporation, City of Ahmedabad*, A.I.R. 1961 S.C. 1810.
118. *Bhuwaneshwariah* v. *State of Mysore*, A.I.R. 1965 Mys. 170.
119. *Id.* at 183.
120. *Supra* n. 113.
121. *Id.* at 380.
122. Aminukutty, "Site Value Tax" in Abhijit Datta (Ed.), *Property Taxation in India*, 94 (1983).
123. Henry George, *Progress and Property* (1879), referred to in Abhijit Datta (Ed.), *Property Taxation in India*, 118 & 22 (1983).
124. *Supra* n. 122 at 94 & 97.
125. Para 8.3, *infra.*
126. Para 8.4, *infra.*
127. See para 8.7, *infra.*

In this manner, the assessable value of land (AVL) is arrived at, for unbuilt as well as built land.

8.4. With reference to the rate of SVT, two alternative procedures are employed.[128]

(a) The rate of SVT *per square yard* is calculated with a view to ensuring that the amount of revenue now generated by property tax is secured.[129]

(b) SVT is computed on *unit value* (instead of per square yard) of the assessable value of the land and made equal to the current rate of property tax.[130]

8.5. For SVT [Alternative (a)],[131] it is necessary to group plots into categories according to their locations, inasmuch as the market value of land varies according to frontage, depth, size and location. By way of illustration, it has been stated[132] that in the South Extension Area of New Delhi, on the basis of a market survey, three broad locational features were distinguished, namely :—

(a) plots facing the main road (high value plots);

(b) plots facing the slums (low value plots); and

(c) remaining plots (medium value plots).

Layout plan available from the Town Planning Department of the Delhi Municipal Corporation gave information about the size and area of plots in South Extension, New Delhi. The requisite SVT rate per square yard was calculated for three locational categories of plots. The total revenue generated amounted to the same as in property tax, allowing for minor differences due to winding up.

8.6. Under alternative B,[133] the first step is to obtain the market value.[134] The pre-requisites were to ascertain—

(i) the area of each sample property; and

(ii) prevailing market price of land per square yard.

For ascertaining market price, regular instruments of sale were not found reliable, as the prices paid for various immovable properties were camouflaged. Hence real estate agents were consulted and, on the basis of information obtained from them, "mid-values" of the prices per square yard were used for the purposes of compilation. The capital values of sample properties were obtained by multiplying mid-values of respective high, medium and low prices by the areas of plots falling in each category.

8.7. As the amortisation period is taken at 10 years, 10 per cent of the capital value is to be assessed for purposes of SVT.

8.8. It is stated[135] that if any municipality adopts SVT system, it would be necessary to devise an acceptable and efficient basis for determining—

(i) the capital value of land;

(ii) the period of amortisation and therefore the AVL; and

(iii) the rate of tax.

It would also be necessary to set the capital value at such a level, that the owners of unbuilt land would not be tempted to transfer their land to the municipal authorities.

8.9. On the basis of the effect of SVT (Alternative B), on tax liability, it is stated[136] that an in-depth analysis threw up the following results :—

(i) Owners of *vacant* plots are most adversely affected, because, instead of paying a nominal sum as tax under property tax, they would pay tax equal to the amount that would be paid by the owner of any property of same category and size;

(ii) Owners who have built houses upto the *optimum* permitted levels are next adversely affected; and

(iii) Owners of those properties which have a higher rate of the value of building to land (Rental Value higher than Assessable Value of land) would enjoy a tax saving.[137]

It is stated that these findings offer sufficient proof of the fact that SVT system encourages more intensive use of land because, when a person pays a tax on the full economic value of a property, he would want to get the money's worth and would not leave the property idle or only partly used.

128. *Supra* 122 at 94, 97 & 98.
129. Para 8.5, *infra*.
130. Para 8.6, *infra*.
131. Para 8.4(a), *supra*.
132. *Supra* n. 122 at 94. 98 & 99.
133. Para 8.4(b), *supra*. Also see para 8.9 *infra*.
134. *Supra* n. 122 at 94, 99.
135. *Id.* at 94, 100.
136. *Id.* at 94 & 101.
137. See para 8.10, *infra*.

8.10. Thus,[138] under the SVT system, it is to the advantage of the owner to build up vacant land as quickly as possible, and build it to the maximum permissible limit. Further, the interest of the owner coincides with that of the community. Building up a plot to the maximum ensures higher return to the owner and provides more dwelling unit to the community. The substitution of SVT for property tax would thus induce an increase in the supply of dwelling units in two ways—

(a) it would hasten construction on vacant plots; and

(b) better return on higher buildings (at least upto 4 floors) would make the construction of such buildings more profitable.

The reason is that under SVT, (i) vacant plots, (ii) partly built-up plots, and (iii) fully built-up plots are all liable to pay the same amount[139] of tax. It ceases to be profitable to hold land for speculative purposes. By increasing the supply of land available for development, SVT should dampen land prices.

8.11. Of course, while the SVT system would establish the necessary *fiscal incentive* for house building, this would not, *by itself*, prove adequate if the *economic incentive* for investment in housing does not improve.[140] (Reduction of cost of construction through standardisation is one measure suggested).

8.12. It appears that there are several countries which have site value taxation to combat land speculation and to bring about development of land. These include—[141]

(i) Argentina [The city of Buenos Ares levies a tax of 5 per cent to 10 per cent on vacant land, in contrast to 0.6 per cent on built-up land].
(ii) Australia;
(iii) Denmark;
(iv) Greece;
(v) Korea [50 per cent tax on unearned increment on land to reduce speculative activities];
(vi) Kenya;
(vii) New Zealand;
(viii) Tanzania;
(ix) Trinidad; and
(x) U.S.A. [some cities, such as South Field (Michigan) and Pittsburg].

8.13. The advantages[142] of Site Value Tax, as contrasted with property tax, have been put forth in various studies on the subject. It may be convenient to set them out in a tabular form as under :—

	Property Tax	Site Value Tax
(i)	The tax is levied mainly on man-made capital	The tax is levied on land.
(ii)	Weight (rate of taxation) adversely affects the quantity and quality of man-made capital	Quantity of land which is created by nature does not rise or fall under the weight or side value tax.
(iii)	Property tax favours old over new, because the tax rockets upwards when the new succeeds the old [*Reason*—Rentals on new buildings or houses are likely to be higher].	Site value tax is neutral, because renewal does not change land value.
(iv)	Property tax encourages holding land for speculative purposes	Site/value tax forces the utilisation of land to the maximum limit.

8.14. However, many of the points put forth above have been questioned[143] and the supposed superiority of SVT over property tax has been doubted.[144]

(i) Thus, it has been stated that it is not true to say that property tax is levied on man-made capital. Whether based on annual value or capital value, the value of land is part of property value and usually, an indeterminate part.

(ii) It is also said that a well-administered property tax would not favour old over new property, as long as land values are rising and proper reassessments are done frequently. Land values are usually changed as a result of building up an area hitherto unbulit-up.

(iii) As regards the claim that site value favours land utilisation, it is stated that a well-administered property tax would also have the same effect. It should be obvious that since

138. *Supra* n. 122 at 94, 102,103.

139. See para 8.9 *supra*.

140. *Supra* n. 122 at 94,104.

141. *Id.* at 94,105.

142. *Id.* at 94 & 95.

143. *Supra n.* 75 at 118,127,128.

144. See also para. 7.3(b), *supra*.

property value subsumes land value, any virtues of site value taxation should also be manifested in property value taxation. The only difference is that site value taxation does not tax the building, which the property tax does. Theoretically, at least, a change from property tax to site value tax should give a boost to housing construction activity.[145]

However, this concession is qualified by citing the experience of a few other countries. Netzer[146] on the basis of a study made by A. M. Woodruff and L. L. Ecker-Racz found little visible evidence of differences between communities which used site value taxation and those which used more conventional forms of property taxation.

8.15. It has also been pointed out[147] that if adequate revenues are to be collected from site value tax, the "assessable (annual) value of land" has to be much higher than estimated total rateable property value. If property values and land values are taken in comparable terms, the SVT would have to be at least 50 per cent of annual site value (assuming that on the average, land value is 30 to 40 per cent of total property value) in order to yield tax revenue equivalent to property tax revenues.

8.16. On a study of the arguments put forth and against site value taxation, it would appear that the principal merits and demerits of site value tax are as under :—

(i) SVT would encourage investment in construction activity. About this advantage, there does not seem to be much scope for doubt. On this point, it is superior to property tax;

(ii) SVT would not favour old property over new. Property tax would favour old property, if it is not well-administered, but would not favour old property if it is well-administered; and

(iii) SVT may have to be based on a higher rate of tax. The validity of this proposition has to be established by further calculation.

8.17. In this position, one can only come to the tentative conclusion that if the encouragement of construction activity in urban areas is the sole or dominant policy consideration, then site value tax is worth a trial. If, on the other hand, augmentation of the tax revenues of municipal corporations is the principal objective, then SVT is not a better alternative than other alternatives.

IX. PLINTH AREA AS BASIS FOR TAX

9.1. Another possible alternative to the present basis of property tax is to levy tax on the plinth area of building.[148] The basic idea is to move away from the concept of property tax levied with reference to ALV (Annual Letting Value) to the levy of property tax with reference to objective criteria related to the building. Although atempts have been made to levy property tax with reference to the plinth area of buildings, such measures have not been able to stand the test of judicial scrutiny mainly on the ground that plinth area alone cannot be a sufficient criterion but other attendant factors should also be taken into account. The Kerala Buildings Tax Act (19 of 1961) sought to levy the tax on buildings on the basis of plinth area alone, and the Supreme Court held[149] that the charging section violated the equality clause of the Constitution. The main grounds for judgment were that no attempt was made for rational classification of buildings and the Legislature had not taken into consideration other factors, like the nature of the construction, the location, the class to which the building belongs and the purpose for which it is used.

9.2. It has been stated that while, in the light of the Supreme Court decision, tax on the basis of plinth area alone would not be constitutionally valid and perhaps also not be sufficiently scientific, it would also be imprudent to give up the whole concept altogether. It is urged that attempts should be made to have a rational classification on the basis of the factors referred to in the Supreme Court judgment and other relevant factors. Thus, the proposed suggestion is that there will be a basic tax related to the plinth area or carpet area.[150] For buildings with appurtenant land exceeding three times the built-up area, there will be a surcharge on the excess appurtenant land. On the basic tax and surcharge, there will be extras based on the location of the building, the type of construction, the nature of its use, and the age of the building. Under each of these variables, there will be five or six categories into one of which the building will be classified. Thus, a building can be classified for purposes of taxation, according to six variables which are all capable of being determined objectively.

9.3. The advantages of the new system, it is stated, will be as under :—

(a) once the rates of basic tax, surcharge and extras are published, it will be possible for a property owner himself to assess the tax payable and to pay tax on a self-assessment basis;

145. See George E Lent, "The Taxation of Land Value" XIV *International Monetary Fund Staff Papers* (1967).

146. D. Netzer, *Economics of the Property Tax* (Brookings Institution, Washington) (1966).

147. *Supra* n. 75 at 118 & 128.

148. *Supra* n. 49 at 83, 84 & 85.

149. *supra* n. 113 [See para 7·11(II) *supra*].

150. *Supra* n. 49 at 83,84 & 85.

(b) the scope for direction now exercised by Valuation Officers will be greatly reduced. Where there can be variation in assessments made by the owner and the Valuation Officer, as in determining the type of construction, the difference in tax will not be very large and the matter can be easily resolved in revision;

(c) the computerization of tax system will be made easier and more scientific;

(d) the effort and expenses in quinquennial revision of property tax can be saved and the staff used for intensive verification of the property characteristics of buildings with higher taxes; and

(e) the variation of taxes can be made by municipalities by altering the rates of basic rate and extras;

(f) progression in taxation can be brought about by fixation of extras in a manner that gives relief to the weaker sections of society.

9.4. It appears, however, that constitutionally, it is not very safe to predict that even with the added safeguards as above,[151] the tax basis of plinth area would be valid. The principal basis, i.e. the foundation will still be plinth area. It will be difficult to escape the objection that unequals are treated as equals, unless numerous other factors (besides the plinth area) are categorised and incorporated in the law. As hinted at in the Supreme Court judgment, these factors atleast include the following :—

(i) nature of the construction;

(ii) location;

(iii) class to which the building belongs; and

(iv) purpose for which the building is used.

Moreover, there may be other factors which the courts may regard as material when the actual controversy arises. If they are not incorporated, the whole fabric may fall to the ground on the score of violating the equality clause.

X. RETAINING TEST OF ANNUAL LETTING VALUE

10.1. Having noted the various possible alternatives to the criterion of annual letting value as the basis for levying property tax by municipal corporations, one has to consider the question whether retaining the present criterion (annual letting value) would not be a course preferable to totally switching over to a new alternative. Most of the other alternatives share one or the other of the defects and weaknesses of the test of annual letting value. In particular, the possibility of arbitrariness (which is one of the major defects assumed to exist in the criterion of annual letting value) cannot be ruled out in the other alternatives also. From the aspect of simplicity, the other alternatives do not stand on a much higher footing than the criterion of annual letting value.

10.2. It is true that various criteria can be devised to avoid arbitrariness in the assessment of property tax. But, there is no reason to believe that any exhaustive list of criteria can be devised that will rank housing units according to their relative attractions as housing units can be ranked on the basis of location of facilities or design and fittings or access to ventilation etc. There are no simple means by which these varied components can be fitted into any one ranking scheme. Such ranking may at best be possible only in a totally planned, officially built city (like Chandigarh), but never in a metro, like Calcutta or Bombay, where land use and associations have developed over time. Moreover, each criterion can only refer to basic minimum level of a certain characteristic for inclusion in each category. It cannot take into account the possible variations within a range. For example, in considering the type of construction, all properties with polished floors would be in one category, regardless of whether the floor is black marble or just plain cement tiles. Similarly, for location and so on. Therefore, within each category, the rate would be regressive till it reaches the next slab, where it will suddenly jump up to a higher level, again to become increasingly regressive within that next range.[152]

10.3. There is also the basic problem of a composite criterion. Whenever we have to take account of several aspects, the resultant criterion is an index, arrived at by weighing these several aspects in order to give a single measure. To be rational, the ranking by these rates should mirror the *relative desirability* of all housing units. In an attempt to locate a set of objective criteria, we are necessarily thrown back to an arbitrary valuation of the relative desirability of housing. For example, suppose a new but badly-built house is compared with an old but well-built house. They will be ranked in a certain order under new criteria. A slight change in the surcharge rates in respect of age of the building will revise this ranking, although the relative desirability for the occupants remains unaltered. This arbitrariness is inherent, in this procedure, unless we have a cross-check, i.e. unless the rates correspond, in some sense, to an independent criterion of desirability, such as the relative *rents they would fetch on the market.*

10.4. Moreover, for any system of progressive taxation the rate of progression must be related to some clearly measurable scale, such as, income, wealth or consumption. In the housing

151. Paras 9·2 and 9.3, *supra.*

152. *Supra* n. 4) at p. 83 & 92.

market, none such measure is available except for the rental or capital values. For example suppose we assume that given various criteria, a property superior in one aspect is also superior in all other aspects, i.e., the better-built house is in more desirable area. Even then, the problem remains; by what numerical amount is this to be quantified as superior to the one next in rank? What 'objective' criterion could supply the answer, unless it is the potential rent that such a housing unit would fetch in the market?

In conclusion, it is easy to find objective criteria, but it is very difficult to find appropriate ones. Moreover, a multiplicity of criteria in such a context has to be resolved by the construction of a single criterion which takes account of multiple aspects. Rental value provides such a multiple aspect criterion relevant to the issue; where it fails it is due to market imperfections. It is easier to correct the shortfalls of the rental value criterion rather than trying to replace it by another.

10.5. Review of the different basis of property taxation in the preceding paragraphs suggests that alternative methods of taxation are unlikely to be superior to the conventional mode of assessing property tax, if it is well-administered. The key is really frequent reassessments and the treatment of vacant land at par with other properties. In current Indian practice, vacant land is not generally taxed, on the ground that it has no annual rateable value. Property taxation based on capital value is probably the cleanest method of assessment, though it also suffers from some administrative problems. It is much easier to administer capital value based taxation when there are active property markets.[153] Usually, this is not a major problem in areas which are newly developed, but, in older areas, transfer of property is fairly infrequent; hence market values are difficult to observe. Furthermore, in Indian cities, the majority of taxable dwellings are tenant rather than owner-occupied. In Calcutta, it was estimated that 75 per cent of properties were rented and only about 18 per cent were owner-occupied. In Ahmedabad, over 80 per cent of properties were rented. The administrative burden is, therefore, lighter for the annual value method where tenancy is the rule and annual rents can be easily observed. A further problem with capital value taxation is the very complex ownership pattern of land that is now emerging in some Indian cities. It is often the case that in newly developed areas urbanised by a public authority, the title to land is not on a freehold basis, but on varying degrees of leasehold--- from short term leases to perpetual leases. There are also usually restrictions on the transfer of land within specified periods, e.g. 10 years from the date of allotment. The meaning of the capital value of land in such cases becomes unclear and annual rental value would be easier to arrive at. One result of such restrictions is that black market transactions take place, reflecting higher values, than would probably be the case were there no restrictions.

10.6. On the whole, it appears better to retain the present system (annual renting value) with such modifications as can be devised to improve its content and administration.

If the test of annual letting value is to be retained, the question naturally arises whether it should be divorced from rents fixed under rent control legislation, since a complaint frequently made is that the restriction on quantum of rent (which inevitably follows from the annual letting value being tied up with rent control legislation) cuts down the total revenue from this tax. At the first, it may sound to be a very simple solution. It can be argued with apparent plausibility that there is no reason why the quantum of recoveries under tax legislation should be clouded by the shadows of statutory restrictions, imposed for some other purpose in legislation which is intended to secure a just and equitable basis for landlord-tenant relationship. But a moment's reflection will show that this would be a very debatable approach. On principle, it is wrong that the legislature should, by one law, regulate the rents of properties and, in another law, authorise the taxation of the properties according to a criterion which totally disregards rent control law. Even if the rent charged in practice exceeds fair rent, this course is ethically wrong.

10.7. The analogy of income-tax on illegal earnings would not be applicable. Charging tax on illegal earnings may be legally permissible, but its ethical soundness still remains debatable. Moreover, the Income Tax Act nowhere specifically declares that an illegal business shall pay tax. It merely taxes the profits of "business". To provide in property tax legislation that the tax will be assessed on the basis of actual rent, even where that rent exceeds fair rent *fixed by law* would hardly be congruous. It would set a very damaging precedent.

10.8. It may be mentioned that the Taxation Enquiry Commission also took the same view. It felt that the annual rental value test is simpler than capital value.[154] Capital values fluctuate to a more significant extent than rental values. The levy on rent is a levy on actual or potential income and is more equitable than capital values. The Taxation Inquiry Commission also expressed the following opinion, as to rent control legislation :

> ..... the controlled rents must be assumed to be reasonable rent, and we are unable to agree that municipalities should, in effect, be permitted to ignore the very

153. *Supra* n. 75 at 118, 128.

154. *Supra* n. 100 at 543 See also, para 6.8, *supra*.

fact that a particular limit has been set by statute to the rent which the landlord may levy and make the assumption that he may 'reasonably' obtain a rent which exceeds the maximum. Nor are we able to agree with the other suggestion, viz. that the landlord should be permitted to pass on, "to the tenant, the increase in the tax which would result from the previous proposal. The real issue raised by the suggestion is in regard to the level at which rent happens to be controlled, and the proposal is, in effect, that that level should be raised to the extent that the tax may be raised on the basis of a 'reasonable' assessment higher than the controlled rent. This raises the larger question as to the levels at which rents should be controlled from time to time. What is clear is that the municipality cannot, through revision of assessments, be allowed, in effect, to decide that question and in individual cases alter the level prescribed by Government.[155]

10.9. So long as rent control is regarded essential as a matter of policy, any rent higher than the controlled rent cannot be regarded as "reasonable" for the levy of property tax. And what is not reasonable ought not to be taxed. It is a different matter if government decides to remove rent control totally or partially. That decision ought to be taken on its own merits and need not be confused with property tax.

10.10. In short, the present criterion of annual rental value should be retained and the question of other alternatives should not be pursued. But there may be scope for improvements, in the present system — a matter which will be discussed, in the next section.

XI. WIDENING THE BASE

11.1. Over the years, several points concerning the rate structure of property tax have been canvassed. These include the following : [156]

(1) Adoption of a consolidated rate in place of several imposts on the same tax base;

(2) Statutory specification of the maximum and minimum of the rates of tax; and

(3) Incorporation of progressivity in the rates and the total exemption of properties with low annual value.

11.2 Property tax as levied in India usually comprises more than one of the following :—

(a) general property tax (house tax);

(b) water tax;

(c) sewerage tax;

(d) conservancy tax;

(e) latrine/scavenging tax;

(f) lighting tax; and

(g) fire tax.

Many of these are service taxes, though they are charged alongwith the general property tax. There appears to be a prima facie case for some consolidated tax. For tax payers, it may make no difference whether they pay it under one name or other so long as the amount paid in toto remains the same. But as far as the administration is concerned, a single rate could be expected to bring in considerable saving of manpower and costs in preparing, servicing, posting and recovering bills.[157]

11.3. The next question to be considered relates to maximum and minimum rates specified in the statute.[158] Constitutionally, it is under State list, entry 49 ("tax on lands and buildings"), that the State Legislatures authorise municipal corporations to levy taxes. In exercise of this constitutional power, state legislatures when they authorise municipal bodies to levy a particular tax they sometimes also lay down a maximum and minimum rate of tax. Within this maximum and minimum limit, municipal bodies at least those in urban areas should be free, without further approval of the state government to fix the rates. At present, in the absence of statutory minimum, the rates are relatively low, while in areas where there are statutory minimum, the rates are relatively low, while in areas where there are statutory minimum, the rates are relatively high. It would therefore be proper to have statutory minimum in all cases of course along with a statutory maximum.[159] This would—

(i) encourage financial discipline among the municipalities;[160] and

(ii) facilitate better state supervision in regard to actual revenue collections.

11.4. There exists a controversy as to whether property tax should be subjected to progressive rate structure. While the argument for introducing progressivity may appear attractive,[161] as

155. *Supra* n. 100 at 377.

156. See K. S. R. N. Sarma, "Municipal Property Tax Rate Structure" in Abhijit Datta (Ed.), *Property Taxation in India* 161, 166 (1983).

157. *Id.* at 161 & 169.

158. *Id.* at 161 & 168.

159. *Cf.* Local Finance Inquiry Committee, Report 74 (1951).

160. *Supra* n. 71 at 117.

161. R. M. Kapoor, "Municipal Property Tax Reform" in Abhijit Datta (Ed.), *Property Taxation in India* 202 & 212 (1983).

based on equity, there can be many counter arguments to show that it may not turn out to be equitable. It has been rightly pointed out[162] that, even without a "progressive" rate, property tax is discriminatory, because it is an impost on the owners of only one category of property (land and buildings) and so discriminatory against them. A progressive rate of property tax will be still more discriminatory.

11.5. This does not, however, complete the discussion of reforms possible in property tax. There remains the question of concessions and exemptions. For example,[163] the point has been legitimately raised that in respect of government properties, tax realisation is frozen. Government buildings used for residence of employees are, it is stated, not subjected to full tax. Current practice is to levy either a service charge on all government-owned buildings irrespective of the use to which they are put or to assess residential buildings on the basis of the actual rents realised from them. Since the actual rents are very low, there is loss to the corporation.

11.6. There is, in any case, scope for a review of exemptions from property tax. At present,[164] exemption is generally granted to the following classes of properties :

(a) Governmental buildings;

(b) Places of public worship;

(c) Places used for charitable purposes;

(d) Buildings for the occupation of which no rent is charged (e.g. choultries) or for which the rent charged is used for charitable purposes;

(e) Buildings used for purposes of recreation (e.g. play grounds) or as libraries etc.;

(f) Building occupied by the owner himself; and

(g) Buildings below a particular rental value.

Not all the municipal bodies exempt all the above properties, but taken together the local bodies in India do exempt these properties. There appears to be a good case for a review of some of these exemptions. There is no rationale common to all the exemptions. Sometimes, what weighs with the corporations in the grant of exemption is the laudable objective of the owner. Sometimes, it is the use to which the property is put. A few exemptions relinked with, or premised on, the incapacity of the owner of the property to pay property tax. While the force behind these various rationale justifying exemption need not be denied, it is necessary to point out that there are counter balancing considerations justifying a different approach. Two of these considerations can be mentioned. In the first place, there is the dire financial need of municipal corporations for whom property tax is an important source of revenue, and a major component of their tax revenues.[165] Secondly, a laudable object does not necessarily justify an exemption. Altruistic activities no doubt need encouragement, but one should not forget that all properties, including properties of charitable trusts and properties used as play grounds enjoy the facilities and services provided by municipal bodies constituted for their areas. It may be that there are other sources of revenue which can be utilised by municipal corporations (besides property tax). However, so long as property tax is levied, and so long as one of its possible rationale of property tax is that it is levied because owners derive benefit from the general services of the local body, there is enough logic to support the charge of tax from properties exempted at present.

XII. TIGHTENING THE MACHINERY

12.1. It appears from available literature that there is scope for tightening the machinery for administration of property tax, not merely for effecting improvement in respect of the amounts collected, but also in regard to general efficiency and by way of avoiding avoidable hardships to tax payers.

12.2. There is a lurking suspicion that property tax is maladministered, with the result that the optimum revenue is never realised.[166] The machinery for assessment of property tax has been one of the focal points of almost every commission or committee set up by the Central or State Government to examine local finances in general or tax administration in particular. Inefficient, inequitable and defective assessment, and consequent loss of revenue,[167] have been highlighted in most of these reports.

12.3. The first point requiring emphasis is that of the need for training of officers charged with the assessment and collection of tax. The old system of municipal councillors being involved in adjudication of tax is fading away. But, as regards the administrative personnel engaged in the work, there still remains the problem of dissatisfaction with the staff — an aspect stressed strongly by the Local Finances Inquiry Committee[168] which observed as under in its Report :—

> 'Valuation of property is such a highly technical business that it cannot be entrusted to any person who has not receiv-

162. *Supra* n. 156 at 161 & 169.

163. *Supra* n. 25 at 19.

164. *Supra* n. 50 at 138, 146, 147.

165. Section 1, *supra*.

166. *Supra* n. 53 at 221 & 222.

167. *Supra* n. 50 at 138 & 150.

168. *Supra* n. 159 at 232.

ed training, however competent he may otherwise be. There is a great difference between ordinary administrative work and the valuation of immovable properties — particularly, properties other than residential houses. In the determination of their annual value, so many principles and standards of valuation have to be applied, that the work cannot be entrusted even to members of civil services from whom usually Executive Officers of Municipalities are recruited.

12.4. Coming to matters of procedure, the procedure for the assessment of property has the following essential components.[169]

(a) Preparation of valuation/assessment lists;

(b) Periodic revision of valuation/assessment lists;

(c) Validation of valuation/assessment;

(d) Grant of exemptions and remission; and

(e) Modifications and alterations in the assessment list of appeals.

12.5. It is not proposed here to go into all the stages of assessment of tax mentioned above.[170] But it is necessary to refer to one particular stage in regard to which there is considerable scope for improvement. Periodical revision of assessment lists of property tax is provided by law for all municipal bodies. But it appears[171] that these provisions of the law are not being adhered to in practice. The period prescribed by statute generally varies from three to five years. But it has been pointed out[172] that too many local authorities are losing substantial revenue each year, owing to the assessment lists remaining more or less static over many years. This itself is due principally to the following factors :—

(i) paucity of staff, *numerically;* and

(ii) absence of *well equipped staff, qualitatively.*

12.6. At this stage, it is also proper to refer to the suggestions for the setting up of an independent central valuation agency,[173] a suggestion which has been mooted from time to time, with variations in points of detail. The main objectives to be achieved if a Central Valuation Agency for property tax is set up are the following :—

(i) isolating the process of assessment from local pressure;

(ii) Attracting better qualified persons to a state-wide cadre;

(iii) potentiality of developing uniform standards in applying the criterion laid down for calculating property tax; and

(iv) easy availability, to the proposed agency, of information collected for the purpose of valuation of property and income for the purpose of various taxes levied by the Central Government.

12.7. The setting up of a Central Valuation Agency as above[174] has been favoured by the following Committees :—

(a) Local Finance Inquiry Committee [Report (1951), pages 90-91] ;

(b) The Taxation Inquiry Commission [Report (1955), Vol. 3, page 373-374] ; and

(c) Committee on Augmentation of Financial Resources of Urban Local Bodies [Report (1963), page 39].

The Committee on Rural Urban Relationship [Report (1966), Vol. 1, page 98] also favoured the creation of a post of Chief Valuation Officer in the Directorate of Local Bodies.

However, it should be mentioned that the Taxation Inquiry Commission had recommended that corporations be excluded from this proposal.

12.8. In the above position, it does not appear to be necessary to pursue this particular point (Central Valuation Agency) on the basis of the present material.

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169. *Supra* n. 50 at 138 & 141.

170. Para 13.4, *supra.*

171. *Supra* n. 50 at 138, 151.

172. Deva Raj, "Assessment of Property Tax" 8(4) Nagarlok 63 (October-December, 1978).

173. *Supra* n. 50 at 138, 154, 157. See also para 4.2 *supra.*

174. Para 13.6 *supra.*

The effect of direct taxes on urbanisation

N. S. Raghavan

THE EFFECT OF DIRECT TAXES ON URBANISATION

N. S. RAGHAVAN

I. INTRODUCTION

1.1. The three crying needs of humanity, all the world over, are food, clothing and shelter and not necessarily in the same order. It may even be said that a man should have something over his head before he can attend to other physical needs. Housing, therefore, assumes importance and after India attained independence and with the improvement of economic growth, various welfare schemes were launched. It cannot be denied that the Government of India has been trying to ameliorate the conditions of all its citizens. As other basic needs enjoyed higher priority, housing had to be relegated to a lower place in the list of priorities till now, because of financial constraints.

1.2. In allocating priorities, there is no doubt that agricultural sector has to get the topmost attention from the government and this sector has now grown up as a pampered child, with lots of subsidies built in the scheme. The second priority is to the industrial/manufacture sector with special emphasis on certain items, like exports, capable of earning foreign exchange resources for the country.

1.3. Industrial expansion, has brought in its wake, a number of undesirable changes. The foremost being, the migration of population from rural areas to urban centres, in search of employment in the metropolitan cities and towns, where industries are located. This migrant population, is not only causing a serious dent on the civic services of metropolitan cities but also pushing the cost of inflation to unbelievable levels, in accordance with the law of demand and supply.

1.4. The time has now come for taking stock of the housing situation in the country and to have an appraisal on the working of various agencies entrusted with the jobs connected with land development and housing. This is necessary before we terminate policies to promote more housing projects.

II. NEED FOR MASSIVE HOUSING

2.1. The declaration of 1987 as the International year of Shelter for the Homeless by the United Nations has focussed attention on house building and more particularly on low-cost housing. A number of seminars have taken place to deliberate on the issue. During the seminar on "Housing and Social Development" 80 experts have recommended that housing be considered a social input and an investment in human resources development. In the seminar on 'Urban Land Policy' the emphasis centred around formulating ways to enable the urban poor to purchase land at a reasonable cost. While inaugurating an international seminar on 'Shelter for the Homeless', the Union Minister for Urban Development clarified that it was not possible for the government alone to remove housing shortage in the country and peoples' involvement was necessary in order to accomplish this tremendous task within a reasonable time-frame. It is apparent that housing projects for the poor need not be taken up only by public sector housing agencies or by voluntary organisations funded by the United Nations agencies but can be effectively and successfully tackled with the participation of all including the private sector.

2.2. The Seventh Five-year Plan document envisages a major task for the private sector in housing, assigning it an investment of over Rs. 29,000 crores, as against Rs. 2900 crores to the public sector organisations. The document further outlining the policy-thrust states, "The time has now come for the Government to set before itself a clear goal in the field of housing and launch a major housing effort not so much to build but to promote housing activity through the supply of physical and financial infrastructure such that every family will be provided with adequate shelter within a definite time horizon .... the Government has to play an active role through developing the necessary delivery system in the form of a housing finance market".[1] This objective can be met only if the government is able to devise a more flexible and innovative system for shelter-finance.

2.3. The availability of financial resources has been recognised as a major constraint to the implementation of mass housing and related infrastructure programmes. At present institutional finance flows to the urban poor only because of the Government of India's directive to institutions like the L.I.C., commercial banks and the HUDCO, to allocate a proportion of their funds to socially oriented sectors or to specifically undertake low-income housing activities on the basis of highly subsidised funds, whose burden has to be borne permanently by the tax paying public. Similarly metropolitan development authorities and housing boards take up housing and infrastructure work at the behest of state governments, with concessional finance provided to them by national financial institutions. What is needed is a complete reorientation of financial policies and creation of a mass institutional financial infrastructure that will serve the urban poor on realistic terms and conditions that they can afford. It was in this perspective that the Seventh Plan has committed itself to the creation of two apex institutions to finance housing and infrastructure for all categories of persons (Infra para 3.1).

1. *Seventh Five Year Plan* 1985—90, Vol. II, p. 293, Government of India, Planning Commission.

III. FUNCTIONING OF VARIOUS AUTHORITIES AT PRESENT

3.1. Let us now see the functioning of the metropolitan development authorities, housing boards, municipal corporations etc., to see how far they succeeded and what type of work they can be entrusted.

3.2. The case of Delhi Development Authority is taken, as illustrative of the working of various metropolitan development authorities. The D.D.A. was set up in 1957 for the planned development of Delhi. It is said to work on a 'No profit no loss' basis. It is stated to have developed about 50,000 acres of land for residential, commercial, institutional, industrial and recreational purposes. From 1966, it started its social housing programmes, today, it claims to have constructed and allotted over 1,25,000 houses. The residential schemes like Rohini and other housing projects for weaker sections had an element of subsidy. It has been stated that in planning for 2001, D.D.A. attached great importance to schemes, like the upgradations of slums, developing sites, services and building night shelters for the homeless in Delhi. It has been stated that for its extensive development programme, D.D.A., generated its own funds for its various projects. The present Vice-Chairman has gone on record saying that there is financial crisis and "this is why it is necessary that the DDA charge lumpsums for a dwelling unit rather than payment in instalments, despite it being a burden for middle and lower income groups. D.D.A. should not be burdened with becoming a financial institution for these groups; they should be helped by legitimate institutions".[2] He has also admitted that there is a financial crisis in the organisation but added that this is due to their investments being tied up for long time. He has felt the urgent need for the organisation to be restructured and decentralised.

3.3. In order to tide over the housing shortages, the government decided that developed land should also be made available to cooperative societies so that they can either build houses or flats on their own. A study[3] in this regard as to how far this laudable objective has borne fruit, clearly points out that the DDA has been a stumbling block in the progress of the housing projects. Firstly, DDA has been delaying grant of necessary approvals for too long ; the land has not been developed properly in that the services have not been available and that houses/flats in 503 societies are awaiting civic amenities like roads, water, sewerage and electricity. This is more astonishing because the DDA's letter in regard to offer of land clearly specifies that cost of land includes services. Some societies are now being asked to deposit colossal sums by the municipal corporation/DESU. In other words, DDA is not spreading the message of the government but discouraging cooperative societies against government policies.

3.4. Even the sale of so called developed plots leaves much to be desired. The Metropolitan Development authorities were to set an example in selling the land at a reasonable cost, so that the prices of land can fall in the market. On the other hand, they are auctioning at exorbitant prices and the reason given for sale at such a price appears to be that with this profit they subsidise the low income flats or even slum development plans. This does not appear to be so because such schemes are highly subsidised by the government. The long and frustrating delay in developing plots has also enabled squatters to occupy many of the lands.

3.5. Let us now consider the case of the Bombay Municipality. Bombay's 1967-81 plan reserved large areas of private land for various public uses as playgrounds, for schools, for dispensaries and for public housing. However 15 years slipped away to find that only a pitiably small fraction of these lands could be acquired for public use. The municipality and the other public bodies involved could not find the money to pay for them. So these areas could not be legally brought into either private or public use. Squatters invaded many of these lands and turned them into slums. The result is that the government has now on its hands the serious problem of providing accommodation to these urban poor. It is paradoxical that the 1967-81 plan achieved only a reduction of the areas available for beneficial use.

3.6. One could blame the government for doing too little. Too little public housing, too little control of land use and land prices. We could blame the municipalities for inefficient garbage removal, careless control on buildings, too little drinking water and so on. Alternatively one can argue that the government has tried too much within the restricted resources allocated and failed miserably.

IV. NEED FOR PARTICIPATION OF ALL

4.1. We, in India, have adopted the concept of mixed economy, in which public, private and government sector companies coexist. Government is constantly endeavouring to see that our industry becomes competitive and produces quality goods, not only for the export market but also for the domestic market. The seventh five year plan calls for a massive investment in housing by the private sector. Housing shortage has been mounting. The problem of housing is so colossal that whatever attempts any authority makes, there is bound to be a massive backlog. The Vice-Chairman, D.D.A., addressing a meeting organised by the PHD chamber of commerce, on 24-2-87 stated that in view of the

2. Times of India (Delhi edn.) 24-2-1987.
3. *Financial Express* 18-2-1987.

serious shortage in housing he had recommended to the central government a scheme for involving private builders in developing sites and constructing dwelling units. It has also decided to encourage cooperative societies, individuals and private developers to help in providing shelters. So at last all the agencies are taking note of the enormous size of the housing problem, which itself is a sign of hope for the future.

4.2. For years, the rent control laws have not only been a major disincentive to private house building; they have also ensured premature decay of the housing stock that the cities had when the rent control legislation first came. It is no wonder then that many of the houses are kept locked and vacant or given on fabulous rents to white *sahebs* of the foreign embassies, who can be counted on to vacate, when their assignments in India, are over.

4.3. The Urban Land Ceiling Act, which was enacted during the Emergency, ostensibly to keep land within the reach of the poor, has effectively strangulated the land market and hurt the very classes, it professed to serve. The metropolitan authorities like the D. D. A. which are meant only to undertake development have somehow got into the auction fever in regard to offer of developed land and have successfully and subtly overturned the Governments objectives of offering the land at reasonable prices and to keep down land prices. Land prices have soared, taking up with them the price of housing. Restrictive land-use regulations and unduly low floor space indices have added to the constraints on housing supply, so that millions of poor people can afford only to squat in slum or on footpaths or apartments.

4.4. It seems clear that the metropolitan cities cannot meet the future housing needs only on governmental backing. A massive effort by all, including private entrepreneurs is required.

V. VARIOUS ALTERNATIVES

5.1. What then are the various solutions to overcome the serious housing shortages and what should be the trends in urbanisation.

5.2. As the Government of India accords high priority to housing needs, the various ways in which these needs can be achieved may be examined. The housing projects may be broadly considered as (i) for the urban poor, (ii) low income groups, and (iii) middle income groups, including salary earners, both in the public and private sectors. There is no need for considering the top rich classes, as they can and do take care of themselves.

5.3. The metropolitan development authorities and slum boards of various State Governments can be more responsible for the development of land, provision of services for housing and night shelter for slum dwellers. Since the activities of these authorities subsidised by the Government they would not be financially constrained. Also as the problem is of socio-political character allocation to these authorities should boost progress.

5.4. The private sector companies, with a proven track record may be associated, in a larger measure, with these programmes also, as is already being done now. For example, Lucknow Development Authority has ensured that 40% of the land given for development and building to a private builder, is for the weaker sectors at 40% of the subsidised cost. In Narayana also a similar subsidised scheme is in vogue, in regard to building contracts given to private sector companies. In this scheme there will be an element of competition in finalising the housing projects in time between the development authorities and private agencies. This will also ensure better quality construction.

5.5. The building projects for the low income group also require some amount of subsidising and the above scheme may be followed here also.

5.6. In regard to provision of housing for the middle income group, developed land may be made available to housing boards, public works departments, cooperative societies and individuals in time, at a reasonable cost. The private sector, in the main, may be allowed to develop and build houses for this category of persons. This will also ensure that the important schemes for the urban poor get their due, at the hands of the Government and the metropolitan development authorities, whose primary duty it is to provide for the urban poor.

5.7. As regards salary earners, in all the sectors, a fund may be created, akin to Central Government employee's Group Insurance scheme or Superannuation funds etc. The fund may have different rates of contribution and period depending on what Government considers to be the value of the building the employee may reasonably hope for, taking into account the length of service, the paying capacity of the employee etc. The maturity value may be paid to the employee only for building or acquiring a house. The contribution to the fund should be eligible for all the tax benefits available for subscription to provident funds.

VI. DIFFUSING THE CITIES

6.1. In order to solve the problem of urban shelter attention needs to be concentrated on preventing overcrowding of cities. Industrial

units/manufacturing concerns should be encouraged to adopt satellite towns and to gradually diversify their activities into the new centres. Substantial tax incentives should be provided to the companies to move to new places.

6.2. The developmental activities in the NCR should be concentrated, to start with, in one town in each of the participating states, which could attract the potential Delhi — bound migrants. As a secondary step, new towns with requisite infrastructure facilities should be developed.

6.3. The need for development of rural areas, as well as industrially backward areas, cannot be over emphasized. For achieving this objective, a cess on industry in developed regions may be imposed and from this revenue employment subsidy for employers setting up projects in rural or industrially backward areas can be paid.

VII. FINANCIAL ASSISTANCE

7.1. It is felt that new revenue mobilisation measures should be formulated in such a way that such new revenue is directed to definite plan projects. Revenue from a particular source of tax measure can be earmarked for a particular purpose. For this, greater resort to funding will be needed. For example, a housing tax can be transferred to a house fund which can be used for financing house building activities.

7.2. At present financial institutions grant assistance funds to HUDCO only to cater to economically weaker sections of society. Only 1 to 1½% of the funds of the nationalised banks are lent to private sector house building activities according to the RBI guidelines. Considering the plan needs and the order of investment needed, the banks can be asked to grant more liberal financial assistance, taking into consideration, the duties and taxes referable to housing projects; for example, the quantum of stamp duty collected on land, unearned increase collected by the metropolitan development authorities and capital gains taxes on real estate transactions. If RBI has permitted larger share of assistance to industries taking into consideration the part played by them, then it is now time for it to accept the priority in urbanisation.

7.3. The development of land itself depends upon its availability, vast tracts of agricultural land will be available for the housing needs according to the new NCR plan. The restrictive clauses of the Agricultural Land Revenue Acts and the Urban Ceiling Act, impose severe constraints on the availability of the land itself. Keeping with the new priorities, the provisions of these Acts should be liberalised only with the intention of achieving the objectives of the Seventh Five Year Plan (Ref. Para. 3.1). The centre should give detailed guidelines in this regard, so that there is a mixed approach.

7.4. Worried at the generation of black money in the economy of the country the Government asked the National Institute of Public Finance and Policy to examine this issue. The study has identified correctly that black money generation is most prevalent in real estate transaction and that black wealth manifested itself, alongwith other forms, in real estate holdings. The Government has amended the provisions of the I. T. Act and have assumed the power of pre-emptive purchase of any immovable property, under section 269UD of the I. T. Act. According to the chairman of the Central Board of Direct Taxes, the Government has decided on the sale of the acquired properties through public auctions, within a month, to prove that black money had gone into the deal, as judiciary would not otherwise take notice of the fact. Going through the deals that have been finalised at the auctions, it is clear that all the big properties have been taken over by public sector organisations, mostly for their office use. The point that is relevant here is whether such big chunks of land should not be put to more useful use in building houses/flats either for low income or middle income groups. Just as rich persons should not be allowed to corner such big plots, public sector organisations should not be allowed to gobble tax payers' money for building one big office on such land.

7.5. It has already been brought out that very little financial assistance is being given to either individuals, cooperative societies or private sector organisations by the financial institutions. The only private sector organisation making worthwhile financial contribution is Housing Development Finance Corporation, which too partly draws funds from LIC etc. All these financial institutions put together have not been able to make a significant dent on the over-all problem. A break through in the housing programme is possible, only if there is easy flow of finances through mortgage and other types of loans at considerably lower rates of interest, say 6-12% annum, as has been done in several countries, to boost up their housing programmes. The difference of 4-6% in the interest rates may be met through Government subsidies on a sliding scale, particularly for the economically weaker sections and low income groups.

7.6. The financial institutions both in the public and private sector giving housing finance may also be allowed to float bonds on the same lines as the public sector organisations floating bonds. The real attraction to the public at large is the interest rate at 10%, which is tax free and the period of

maturity of 10 years. To attract investment to housing the interest rate could be kept at 13% and the maturity period may be reduced to 5 years.

7.7. As pointed out in para 3.1, the Seventh Plan has committed itself to the creation of two apex institutions. One is the National Housing Bank, to provide large finances for the massive housing programme envisaged. This Bank should be in the public sector and should have equity participation of the Government of India, banks and financial institutions. Even though it should seek to function as a viable economic entity, profit making should not be the main objective. Apart from mobilising funds on a large scale, from capital markets, it should also mobilise, apart from other savings, savings from households, both in the formal and informal sectors.

7.8. The second apex body is the Urban Infrastructure Development Finance Corporation. Sufficient progress has not been made in this direction. But this is a very important institution. This institution is to develop expertise and provide technical assistance to the urban infrastructure sector, provide access to local bodies to institutional finance, mobilise financial resources for urban development programmes and provide focus and attention for larger investment flows into the urban infrastructure sector.

7.9. This institution also should be in the public sector and equity capital should be held by the Government of India, banks and financial institutions. This would be necessary, as it would be financing long gestation and low profit yielding activities. The Seventh Plan has committed to the UIDFC Rs. 35 Crores for urban development schemes and Rs. 20 crores for water supply and sanitation schemes. This would be the initial equity capital and the bulk of the finances will have to be mobilised elsewhere. LIC, UTI and RBI will have to be major contributors. Provident funds etc., will have to be required by a law to contribute a portion of their funds. It would also be desirable to raise funds through user charges. The user charges should be on the high side for commercial, trading and manufacturing process.

7.10. The UIDFC would not only have to mobilise resources on a massive scale but would also have to undertake refinancing of urban development programmes of state and local level institutions. It would have to perform a major role in changing the thrust of operations of metropolitan development authorities which have diversified their activities into housing construction at the expense of development of urban infrastructure. Similarly it has also to play an important role in rationalising the activities of urban local bodies.

7.11. The expertise of the private sector also should be used to implement urban infrastructure programmes in line with the development programmes of the central and State Governments, subject to guidelines and time schedules, that may be laid down by the UIDFC.

VIII. EFFECT OF DIRECT TAXES INCENTIVES FOR ENCOURAGING HOUSING ACTIVITY

8.1. Now let us consider the effect of direct taxes on urbanisation, whether they are enhancing the objectives or acting as impediments. It cannot be denied that the Government has been giving suitable relief in direct taxes, though in driblets, over the years. It is unfortunate, but true that real estate has come to be equated with the generation of black money. There is no denying the fact that people do not disclose true and full sale proceeds of land and/or buildings. This was so mainly because, in the earlier years, the incidence of capital gains was very high. Over the years, the incidence of capital gains tax has been slowly lowered. It is necessary to emphasize that Section 54E of the I. T. Act, had proved, when first introduced, to be extremely beneficial to the economy, because it was the only provision which had succeeded in curbing tax evasion, and bringing resources into the national stream. Liberalisation of the provisions of capital gains tax, either by charging tax on the real capital gains made by an assessee by adjusting the original cost of the property according to the inflation which has taken place between the year of purchase and the year of sale. Or by adopting an artificial date to determine the fair market value of the property as prevalent on 1st April 1980, instead of 1st April 1974. This has been brought about by an amendment, effective from assessment year 1987-88.

8.2. Also, at present exemption is given under section 54E of the Income Tax Act, in respect of capital gains arising from long term capital gains, provided the full sale proceeds are invested in approved assets, which include rural development bonds, units of the Unit Trust of India etc. Since the objective now is to increase housing activities, investments in proposed housing mortgage bonds, or deposits in Housing Development and Finance Corporations may be declared as also eligible for investment for the purposes of section 54E.

8.3. Jewellery is the most unproductive form of investment, which unfortunately is very popular in this country. To make this a readily available tool for channelising as deposits in Housing Financial Institutions, it may be provided that if the sale proceeds of jewellery are invested as mentioned above, and investments

remain as such for a period of 3 years, the capital gains on sale of the jewellery would be exempt from tax. The restriction in regard to exemption, if a residental house is purchased need not be enforced if the assessee has one more house of not more than 1600 sq. ft.

8.4. It may be legitimately asked whether a person would go in for a house if fiscal incentives only are given. For the richer classes, money is no consideration and they are guided on investment decisions, either on commercial considerations or by their luxurious way of life. Thus fiscal, incentives do count for these persons in taking a decision with regard to housing investments. The middle income and low income groups either use their savings or go in for loans, if they consider a dwelling unit, a necessity.

8.5. A man who struggles to balance his domestic budget cannot possibly save inspite of the most generous incentives given by the Government, and therefore, separate schemes for housing for such persons have already been suggested.

8.6 The fiscal incentives given at present for promoting savings and investments are woefully inadequate when one takes the totality of the picture into account. Section 80L grants a deduction of Rs. 7,000 in respect of dividends on shares, interest on bank deposits, National Savings Certificates etc. A further deduction of Rs. 3,000 is given in respect of dividends from units in the Unit Trust of India and Rs. 2,000 for interest on deposits under National Deposit Scheme. There is a great need to increase the quantum under each head. To attract investment in housing, for investments in all Housing Finance Corporations etc., providing financial assistance for housing, a separate quantum of exemption say Rs. 5,000 at least should be provided for.

8.7. The Finance Minister explained in the discussion paper on the 'Simplification and Rationalisation of Direct Tax Laws'[4] that attempts were being made to do away with the provisions which result in the computation of notional income and as a first step has already made amendments in the computation of income from self occupied residental property on the basis of 'annual income' of the property. The result is that notional income rising from self occupied property (limited to one such property) and the property which is not occupied will no longer be liable to tax. The 'annual income' will be the actual rent received or receivable in respect of the property, subject to the condition that if the actual rent received or receivable is less than the municipal value, the higher of the two will be taken. This concept of real income, with regard to self-occupied property, should enthuse people to go in for housing. The position with regard to rented properties especially the linking of 'annual income' with municipal rateable value will not only defeat the concept of real income but also will be another factor like the Rent Control Act, which will hinder progress of housing projects.

8.8 The 'Discussion paper'[5] also contains a reference to a very special type of incentive at present in vogue, only in Sri Lanka, to encourage housing activity by enabling the assessees to invest their savings in new residential houses. The proposal is to extend the benefit of deduction, under section 80C of the Income Tax Act, to payments made by an assessee towards the cost of a new residential property including repayment of loan and interest thereas. The deduction for repayment will be allowed only if the borrowings are made from specified sources such as the central or state government, any bank, LIC, any financial corporation engaged in providing longterm finance for construction or purchase of house in India, as approved for the purchase of section 36(1) (viii) or any other company or cooperative society engaged in the business of financing for housing. It has however been proposed that a person availing of this benefit would not be entitled to the tax exemption under section 54F nor the deductions mentioned in section 24 out of the income from house property. This proposed incentive for housing is indeed a laudable effort in the direction of channelising savings and investment in the most desirable activity. However, the incorporation of the said incentive in Chapter VI A does not seem to serve any concrete purpose as the ever-widening scope of section 80C is only enlarged; on the other hand, it blunts the otherwise innovative and appealing incentive. It is therefore suggested that the incentive provision be transferred as a deduction under the head 'Income from house property' by way of a new clause in section 24 itself.

8.9. Pleading for a radical housing policy we suggest that diverting black money towards construction of houses of area upto 1000 to 1600 sq. ft., may be one of the methods of encouraging the building of houses for the low-income and middle income groups. If at all this suggestion does not find favour, the incentive given for building houses with loans from approved institutions, may also be extended to houses built with self finance, by allowing equal deductions in 5 years.

4. Presented by the Union Finance Minister to Parliament in April 1986 to elicit public opinion by 30-9-1986.

5. *Ibid.*

IX. TAX RELIEFS TO ENCOURAGE HOUSING ACTIVITY

9.1. The following tax reliefs may be considered for encouraging investment finance resources.

9.2. In the absence of any general legislation under which private institutions and companies could be established, the concession available under section 10(20.A) of the income-tax Act to an authority constituted in India by or under any law for purpose of dealing with and satisfying the need for housing accommodation or for purposes of planning, development and improvement of cities, towns and villages is being availed of only by government sponsored bodies. In view of the suggestion in this paper that developmental activities also should be given to approved agencies and organisations in the private sector, this exemption should be extended to these organisations, as well. The institutions may also be allowed an accelerated rate of deduction of expenditure, say 133-1/3 of expenditure in specified urban infrastructure programmes, whose beneficiaries are the urban poor.

9.3. Section 32(1)(iv) of the Income-tax Act, extends a useful concession for motivating employers to construct dwelling units for their employee. This concession has not been availed of, in a law measure, due to its low ceilings. The increased ceiling limit of Rs. 10,000 per annum for employer to which it applies, should appropriately be raised to at least to the income level which is below taxable limit (now Rs. 18,000), if this may not be extended upto Rs. 25,000. To secure a large impact, the rate of deduction on account of depreciation should be raised from the present 40% to 100%.

9.4. The deduction limit of 50% and monetary ceiling of Rs. 10,000 under section 80-CC of I. T. Act may usefully be raised to 100% and Rs. 20,000, respectively for shares forming part of eligible issue of capital by an approved public company formed and registered in India with the main object of carrying on business of providing long term finance for construction or purchase of houses upto 1600 sq. ft. in India for residential purposes.

9.5. For a healthy growth of housing market, a mortgage insurance scheme should be put into operation with a view to limiting the risk factor and proposals pending for several years for floating a mortgage insurance company/ corporation on the lines of the corporation in the United States of America may be put into operation, as early as possible.

9.6. In a number of states, the rate of stamp duty and registration charges on sale of immovable improvable properties are prohibitive and encourage sellers/buyers to undervalue the transactions. Already the National Institute of Public Finance and Policy, in its report on the causes of generation of black money, have squarely blamed that increases in the tax ratio in the economy comprising of taxes levied by the central and state governments had been associated with increased tax evasion. In the 'remedial' measures discouraging tax evasion the report suggested that the stamp duty on real estate transactions be reduced to 5% *ad valorem*. The central government may frame guidelines for bringing down these rates, to reasonable levels.

9.7. The evil consequences of the Rent Control Act, of keeping out of supply even the built up houses, have already been referred to. It cannot at the same be denied that poor tenants require protection. It is, therefore, suggested that rent control laws should apply to tenaments of 500—750 sq. ft. only. The bigger houses and flats above that limit must be taken out of the purview of the Rent Control Act, to boost building activity of houses. Rent Control laws should also not apply to commercial buildings.

9.8. The contribution of non-resident Indians to India have been of a sizable order. This contribution however has been more towards industries. To attract non-resident investment in building construction activity, the definition of "specified asset" of section 115(C) (f) of the Income-tax Act may also include investment in immovable property of areas upto 1600 sq. ft. They should also be able to get advantage of the concession in capital gains under section 115F of the Act. They may also have the privilege of tenanting their houses, thus forging more durable links with India.

9.9. Housing is an activity which has a vital human angle. The government having accepted promotion of group housing, instead of line housing in metropolitan cities, so as to put the scarce land resources to optimum use, it is heartening to see that the government has decided to tax real income from house property and has accepted the real owner as the legal owner. With the result, income from apartments in the multistoreyed buildings in Delhi will be treated as 'Income from House property' with effect from assessment year 1988-89. Since the Delhi Apartment Act 1987 also applies to old buildings, it is hoped that suitable instructions will be issued by the C.B.D.T. for the earlier assessment years also at an early date.

X. MISCELLANEOUS SUGGESTIONS

10.1. Last but not the least, the building construction activity has to be treated as 'industry' in order to ensure increase in the flow of financial resources in the housing sector through greater budgetary allocations and institutional resources as also priority allocation of material resources. Fortunately the Minister for Urban

Development while addressing the consultative committee of 18th December, 1985 observed that for housing to play in effective role in achieving its target, the Ministry has come to the conclusion that it was essential that housing be treated as 'Industry'. It is hoped that the Ministry will ensure that steps are taken in this direction, early.

10.2. The limit of sale proceeds of Rs. 2 lakhs for non-levy of capital gains tax requires enhancement. Even the 2 room flats (about 900 sq. ft.) built by the D.D.A., with inferior materials, are being sold at Rs. 2 lakhs. The decent accommodation for middle income groups is around 1600 sq. ft. This will cost around Rs. 4 lakhs. It is, therefore, suggested that the limit for capital gains may be fixed at Rs. 4 lakhs. The wealth-tax exemption for a house may also be fixed at this figure. The government may lose some revenue but this will be compensated by increased housing activity.

10.3. In wealth-tax, suitable proposals, in keeping with the above are suggested.

10.4. The rules of valuation for leaving of wealth-tax though simplified, still require liberalisation if the building activity has to pick up substantively.

10.5. In the case private builders or developers, the houses built by them are being considered as their wealth. In the case of industries, stock-in-trade is exempt from wealth tax. Since the builders are dealing in properties and the profits are being fixed as business income, these assets may be treated as stock-in trade.

10.6. To sum up, a package of income an wealth tax exemptions and incentives and reduction in stamp duty as well as multiplication and strenthening of housing finance institutions is necessary to ensure massive mobilisation of finance and their proper channelisation in support of a National Housing Programme.

An analysis of the transfer of property and registration acts

P. M. Bakshi

AN ANALYSIS OF THE TRANSFER OF PROPERTY AND REGISTRATION ACTS

I. INTRODUCTION

1.1. Legislation relating to immovable property in India is intended to be examined in this study, with special reference to the question how far such legislation tends to put unnecessary impediments in the way of proper urban development. Legal provisions on the subject are not to be found in one self-contained piece of legislation, but are scattered in several laws. Adopting one possible basis for classification, one can state that such laws may deal with (i) the acquisition of rights to, or interest in, immovable property, (ii) holding and enjoyment of such rights, and (iii) disposal of such rights. Besides this, compulsory acquisition of such property by the state may supplement private disposal and override the private holding and enjoyment of property.

1.2. Examining such laws from the juristic point of view, they can be classified on another basis, namely, first, laws dealing with substantive rights and creation or extinction or modification of such rights and secondly, laws focussing not upon the rights but upon the machinery and procedural matters. For example, the nature of the rights that can be legally acquired in immovable property is governed largely by the Transfer of Property Act, 1882, while the recording of acquired rights is governed primarily by the Indian Registration Act, 1908.

1.3. These are examples drawn from civil law. It may also be mentioned that the right to hold immovable property peacefully and to secure protection against criminal interference looms large in those provisions of the Code of Criminal Procedure, 1973 which concern disputes relating to immovable property that are likely to lead to a breach of peace. That, however, is a very specialised topic. Similarly, there is a complicated legislative network in form of Rent Control Acts in force, in most urban areas, conferring protection against unjustified eviction of tenants or increase in rents. But that also is a specialised topic. Such specialised topics are not proposed to be covered in the present study.

The study will be confined to enactments of general application relevant to the theme of urban development. The emphasis will be upon those provisions that cause practical difficulties, for which a legal solution may be regarded as feasible. Obviously, it is not intended to give an exhaustive summary of case law.

II. TRANSFER OF PROPERTY : GENERAL RULES

2.1. As already stated, the focus in the present study will be on those provisions which seem to require change or rethinking or review in the light of the needs of a society which is being highly urbanised. The main object will be to consider points that are relevant to a smooth, expenditious, convenient and uncumbersome process of acquisition, enjoyment and transfer of rights in immovable property. In so far as the law on the subject is codified it is principally contained in the Transfer of property Act, 1882. The scheme of the Act is first to deal with general rule relating to transfer of property by act of parties, and then to deal with specific transactions such as sale, mortgage, lease, exchange, gift and transfer of actionable claim. Chapter 2 of the Act (sections 5 to 53A) deals with transfer of properties by act of parties. In this chapter sections 3 to 37 apply to all transfers of property whether movable or immovable, while sections 3 to 53A apply to transfer of immovable property only. While some of the provisions have no importance in the context of urbanisation, a few of them do require notice.

2.2. One can first take up section 10 of the Transfer of Property Act, 1882 (TPA) which lays a restraint on conditions preventing transfer.

The point to make regarding this section is that its object of invalidating conditions restraining alienation is very often defeated by special enactments concerning land allotted by development authorities, housing boards and similar bodies, which enactments are encumbered with a number of restrictions on the transfer of proprietory rights. Even legislations such as the Delhi Apartments Act, make only half-hearted attempts to liberalise the law. The enactments pertaining to such schemes approach the matter from a completely different angle than section 10 of TPA. Section 10 makes transferability the rule, and non-transferability an exception. In contrast, the special laws concerning the above bodies regard non-transferability as the rule and transferability as an exception.

2.3. The remedy for this situation lies in a changed attitude on the part of the authorities concerned which should be more in conformity with section 10 of the Transfer of Property Act rather than with a paternalistic approach.

2.4. Analogous to section 10 of the TPA is section 12 of the same Act, dealing with conditions making an interest in immovable property determinable on insolvency or on attempted alienation.

The comments made above with reference to section 10 apply[1] in substance to section 12 also

1. Paras 2.2 and 2.3 *supra*.

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2.5. The subject of benami transactions—a field in which there is much confusion and misconception is not directly dealt with in the TPA. The Act does not define "benami" nor does it spell out its ingredients. But the practice of creating such transactions in India has been recognised for more than a century. The Privy Council observed as under :—

> "It is very much the habit in India to make purchases in the names of others, and from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as 'Benami transactions"[2]

2.6. A curious situation has arisen with regard to transactions involving spouses. Courts have come to the view that when the money is provided by the husband and the purchase is in the name of the wife, the transaction must be taken to be a benami one. As late as in 1981, the Supreme Court stated the legal position thus[3] :

> "When a property is purchased by a husband in the name of his wife, or by a father in the name of his son, it must be presumed that they are benamidars, and if they claim it as their own by alleging that the husband or the father intended to make a gift of the property to them, the onus rests upon them to establish a gift ....
>
> It is but axiomatic that a benami transaction does not vest any title in the benamidar but vests in the real owner. When the benamidar is in possession of the property standing in his name, he is in a sense the trustee for the real owner; he is only a name-lender or an alias for the real owner."

2.7. It may be mentioned that the English law on the subject is diagonally different. The position was lucidly stated again by the Supreme Court.[4] In that case, on the facts, the transaction was held not to be benami, but the legal position in England as dealt with in the judgment may be quoted :—

> Under the English law, when real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser. It is, however, open to the transferee to rebut that presumption by showing that the intention of the person who contributed the purchase money was that the transferee should himself acquire the beneficial interest in the property. There is, however, an exception to the above rule of presumption made by the English law when the person who gets the legal title under the conveyance is either a child or the wife of the person, who contributes the purchase money or his grand child, whose father is dead. The rule applicable in such cases is known as the doctrine of advancement which requires the court to presume that the purchase is for the benefit of the person in whose favour the legal title is transferred even though the purchase money may have been contributed by the father or the husband or the grand father, as the case may be, unless such presumption is rebutted by evidence showing that it was the intention of the person who paid the purchase money that the transferee should not become the real owner of the property in question. The doctrine of advancement is not in vogue in India.[5]

2.8. The doctrine that a transaction in the name of the wife must always be regarded as benami is becoming out of date, particularly, at a time when many husbands have a genuine desire to benefit their wives through gifts in their favour or through properties purchased in their names. It is highly inconvenient for a wife, if she is called upon to prove positively that there was such a desire on the part of the husband. As the law stands at present, the burden is on the wife.[6] It may be that ultimately she succeeds in discharging the burden, but this is only after considerable loss of time, effort and money. The Madhya Pradesh Government, in a case reported in 1980,[7] attached the property standing in the name of the wife for debts due from her husband. The wife had to file a suit for defending her right, the suit was ultimately decreed, but relief could be obtained only when she fought upto the Supreme Court. The Supreme Court observed:[8]

> "Once the plaintiff proved, by virtue of the registered sale deed, that she was the owner of the house and also explained the source of the price paid by her for it, that was sufficient to hold that the property belonged to her and could not be attached for the recovery of dues owing by her husband. The State never

2. *Gopeekrist Gosain* v. *Gungapersaud Gosain*, (1854) 6 *Moo Ind App* 53 at 72 ( ) quoted by the Supreme Court in *Siddique Fatima* v. *Mohmood Hassan*, A.I.R. 1978 S.C. 1362 at 1376.

3. *Controller of Estate Duty* v. *Aloke Mitra*, A.I.R. 1981 S.C. 102 at 110.

4. *Bhim Singh* v. *Kan Singh*, A.I.R. 1980 S.C. 727.

5. *Id.* at 732.

6. Para 2.6 *supra.*

7. *Gapadi Bai* v. *State of M.P.*, A.I.R. 1980 S. C. 1040.

8 *Id.* at 1041.

pleaded or proved that the property was purchased by defendant No. 5 in the name of his wife, the plaintiff. The onus to prove these facts lay on the State in the face of the registered deed and the other evidence produced by the plaintiff."

2.9. Of course, the points discussed above concerning the position of spouses do not fall under this or that section of the Transfer of Property Act, but pertain to the entire law of property. However, it may be mentioned that the Act does contain a provision as to transfer by ostensible owner in section 41.

2.10. It may be of interest to refer to a recent Madhya Pradesh case which illustrates how courts have been taking a liberal attitude, but which at the same time also illustrates how citizens, particularly women, may be put to inconvenience by an incorrect approach based on an overzealous bureaucratic attitude to treat **every transaction** as benami unless the contrary is proved. The facts of the case were as under.[9] A married woman, who had her own business, owned a house. Her husband was also carrying on a business, in the course of which sales tax became due. The tax having fallen in arrears, the authorities attached the woman's house for recovering the demand due from the husband. The woman had to take proceedings to set aside the attachment and she succeeded. The sales tax department had produced no evidence to prove the benami character of the transaction and had failed to discharge its burden.

It is surprising that in this case, a very curious argument was advanced by the department. The argument advanced was that in several proceedings before the Sales Tax Officer, the lady had been represented by her husband. The High Court case down heavily on this reasoning, making the followig comment :—

"This really appears to be a strange reasoning. We all know that in several proceedings, parties are represented by their Advocates and for that reason it has never been held that Advocates are real owners and parties represented are benamidars. Clearly, therefore, the statement of Uttam Singh is mere **ipse dexit** and betrays his knowledge of law of evidence and benami transactions."

III. SALE OF IMMOVABLE PROPERTY

3.1. The Transfer of Property Act, in section 51, defines "sale" and, in the same section also provides how the sale of immovable property is to be effected. The first three paragraphs of section 54, which are material for the present purpose, are quoted below :—

> 54. 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

3.2. From the second paragraph of section 54 of the Transfer of Property Act,[10] it follows that in the case of tangible immovable property of the value of one hundred rupees and upwards, sale can be made only by a registered instrument. There is a strong case for increasing the amount to, say five thousand rupees. The suggestion is based on the fall in the value of the rupee that has taken place since 1882 (when the Act was enacted). But there is also an additional reason. Executing an instrument, that is to be registered and securing copies after registration, have become a time consuming process. In part, this is due to the large number of proprietary transactions, which large number is itself due to increasing population and growing urbanisation. The law must respond in a satisfactroy manner to this situation. Moreover, trangible immovable property probably passes hands more frequently today than before and the process of effecting such transfers should be made, as far as possible smooth and speedy. The eniciency of the registration department today is not so high as one would desire it to be. For all these reasons, the substitution of five thousand rupees for rupees one hundred in section 54 is eminently justified, even if, mathematically, the modern equivalent of the sum of one hundred rupees of the 19th century may be slightly lower than five thousand rupees.

3.3. Incidentally, it may be observed at this place that the Indian Registration Act, 1908 itself is in need of extensive changes on various points. Many of these have been dealt within a comprehensive report of the Law Commission on the Registration Act. The changes to be effected at the present day should also cover administrative matters, particularly the procedure for registration. It is not merely the law that impedes the smooth flow of property transactions. There is the aspect of practical working also. Any visit to a registration or sub-registration office in a big city will convince an intelligent citizen how large is the scope for improvement in the actual working of the machinery for registration: speedy disposal, quick guidance, prompt attention, clean administration, elimination of touts, general courtesy and overall efficiency. These matters do not fall within the

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9. *State of M.P.* v. *Shakuntala Devi*, (1987) 12 *Ind. Jud. Raports* (MP) 143.
10. Para 3.1 *supra*.

purview of "Law reform", in the narrow sense. They can be more conveniently dealt with by administrative supervision and inspection. There should be a comprehensive inquiry into the working of registration offices because, after all, it is the registered document which the common man or the common woman regards as a prized possession.

IV. MORTGAGES OF IMMOVABLE PROPERTY

4.1. The Transfer of Property Act has a long chapter dealing with mortgages of immovable property and charges extending from section 68 to section 104. These sections deal with the concept of mortgage, rights and liabilities of the mortgagor and the mortgagee, priority as between mortgages, marshalling and contribution, depositing in court, redemption, anomalous mortgages and charges, followed by notice and tender. The procedural provisions concerned with suits for mortgages are now found in Order 34 of the Code of Civil Procedure, 1908. Of course, all those provisions hinge on the definition of mortgage (section 58), the formalities for mortgage (section 59), the right of redemption (section 60) and the right to foreclosure or sale (section 57). Some of these basic provisions need a second look, in view of urbanisation.

4.2. Section 58 of the Transfer of Property Act, having defined a "mortgage", enumerates six classes of mortgages, as under:—

(i) simple mortgage ;

(ii) mortgage by conditional sale ;

(iii) usufructuary mortgage ;

(iv) English mortgage ;

(v) mortgage by deposit of title deed ; and

(vi) anomalous mortgage.

4.3. A type of mortgage which is confined to urban areas in the scheme of the Act is mortgage by deposit of title deed. Section 58(f) of the Transfer of Property Act defines it as under:—

> "(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

Some suggestions on this section will be made presently.[11]

4.4. In section 59, the Transfer of Property Act deals with the mode of creating a mortgage other than a mortgage by deposit of title-deeds. The section reads as under :—

> "59. Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by registered instrument signed by the mortgagor and attested by at least two witnesses."

Where the principal money secured is less than one hundred rupees, a mortgage may be affected either by a registered instrument signed an attested as aforesaid, or except in the case of a simple mortgage by delivery of the property.

4.5. It is suggested that in section 59 of the Transfer of Property Act dealing with the modes of effecing a mortgage, the amount of one hundred rupees mentioned in the two paragraphs should now be increased to rupees five thousand. This is necessary by reason of the fall in the value of the rupee since 1882, and also for certain additional reasons which have been mentioned while dealing with the formalities for effecting the sale of immovable property under section 54 of the Act.[12]

4.6. Under section 58(f) of the Act,[13] a morgage by deposit of title-deeds, commonly known as equitable mortgage, can be created only in Calcutta, Madras and Bombay and in other towns notified by the State Government. A pretty large number of towns have been notified by the various State Governments. Every time one wishes to ascertain whether a particular town has been notified under section 58(f), one has to check the notifications. It is true, that the commentaries on the Act usually give a list of such notified towns. However, one is never sure whether the list is complete, accurate and upto date. Moreover, with urbanisation rapidly taking over, a time lag may intervene between the date on which a particular city reaches a certain level of population or commercial importance and the date when, by notification, it is actually brought within the ambit of section 58(f). There is definitely a scope for improvement in this situation. The cities notified so far seem to have been notified broadly on the basis of population. If so, it would be proper to provide that every city whose population, at the last census before the mortgage, exceeded a particular figure, say two lakh, would be regarded as a city where an equitable mortgage can be created. This will eliminate the necessity of consulting various notifications, and even the necessity of State Governments having to issue a notification everytime. The power to notify can, in theory, be

11. Para 4.6, *infra.*
12. Para 3.2, *Supra.*
13. Para 4.3, *supra.*

retained to deal with towns which, though having a small population, are regarded as commercially important. While making these changes in section 58(f), it will be appropriate to consult banking circle as well as chambers of commerce and industry, who are daily concerned with such mortgages and who can be expected to make some useful suggestions.[14]

V. LEASES OF IMMOVABLE PROPERTY

5.1. The Transfer of Property Act contains, in Chapter 5, provisions relating to leases of immovable property. These provisions deal with the definition of lease, the duration of leases, formalities for creating leases, rights and liabilities of lessor and lessee, determination of leases, effect of holding over and exemption of leases for agricultural purposes.

5.2. In theory, a lease can be executed in respect of any immovable property.

5.3. The duration of a lease is a matter of contract between the parties. But it has two important legal consequences. If the duration is a fixed one, the lease cannot be terminated by notice, unless there is express provision to that effect. In contrast, if the duration is not for a fixed period, the lease can be so terminated in accordance with section 106 of the Act.[15] Secondly, the duration of a lease is important as regards the formalities to be undergone for entering into lease. Section 107, first paragraph, provides that a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. The second paragraph provides that all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Under the third paragraph, the registered instrument must be executed by both the lessor and the lessee. Finally, there is a proviso in section 107, under which the State Government is vested with power to exempt certain leases from the requirement of registered instrument or delivery of possession.

5.4. As stated above, where the term of the lease is not fixed, it can be terminated by notice, commonly known as notice to quit'.[16]

5.5. Under section 106, first paragraph, where no term of lease is fixed, and no local law is operative, and no usage to the contrary is there, a lease is terminable by either party, by six months' notice or fifteen days' notice, as the case may be. The notice must expire with the year of tenancy (if it is six month's notice) or at the end of a month of tenancy (if it is fifteen days notice). While the practical importance of the provision regarding notice is almost nil for areas where the Rent Control Act applies, it does have a theoretical importance. A pretty large bulk of case law on section 106 is concerned with the words "expiring with the end of the month of tenancy", which appear towards the end of the first paragraph of the section. Hundreds of reported decisions deal only with the question whether the notice given in the particular case satisfies this requirement. Such controversies dealing with matters of detail could be eliminated by a simple device. The law can have a provision that if a notice is given by the lessor or the lessee, indicating an intention to terminate the lease, the lease stands terminated the end of the month of the tenancy in which a period of fifteen days after the notice expires. The result of such an amendment will be, that of notice will ever be totally invalid (as happens at present) merely by reason of defective drafting. Only, the date of operation of the notice will be determined in accordance with the new formula.

VI. REGISTRATION

6.1. The Indian Registration Act, 1908 is the principal enactment dealing with registration of documents relating to immovable property. This is a long Act, much in need of reform on several matters of detail.[17] This Chapter will be concerned only with those questions which are of importance with respect to the transactions that have created problems.

6.2. Section 17 of the Indian Registration Act, 1908 provides for compulsory registration of documents relating to immovable property of the following categories :—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent; and

(e) ....

6.3. The amount of rupees one hundred mentioned in section 17(b) of the Registration Act, should now will be increased to rupees five

14. As to registration of memorandum of deposit see para 6.5, *infra*.

15. Para. 5.4. *infra*.

16. Para. 5.3. *supra*.

17. Para 3.3 *supra*.

thousand. This is in view of the fall in the value of the rupee, and in the light of certain other reasons already dealt with while discussing section 54 of the Transfer of Property Act.[18]

6.4. As regards equitable mortgages, registration has created some problems. An equitable mortgage, that is to say, a mortgage by deposit of title-deeds, can be created in a notified town by depositing title-deeds under section 58(f) and section 59 of the Transfer of Property Act.[19] However, it has been held that if the terms and conditions of the mortgage have been written down, then the writing will require registration. In short, if a memorandum accompanying an equitable mortgage contains merely the list of documents, registration is not required, but if the memorandum contains the terms and conditions of the mortgage, then it would require registration.[20] The rationale underlying this position has been thus explained by the Supreme Court :[21]

"It is essential to bear in mind that the essence of a mortgage by deposit of title-deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing this implicaion of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under section 17 of the Indian Registration Act, 1908 as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered, it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

Thus, a distinction is made between two situations as above regarding equitable mortgage.

6.5. While the above position regarding registration of equitable mortgages may be theoretically very neat, the practical aspect cannot be ignored. In practice, it is difficult to distinguish between the two situations contemplated by the case law.[22] Apart from that, the requirement of registration, if the memorandum contains the terms etc. considerably reduces the utility of this procedure. The legislature might well consider whether it should not provide that a memorandum relating to deposit of title deeds shall not require registration, even if it contains some or all of the terms and conditions of the mortgage.

18. Para 3.2., *supra*.
19. Paras 4.3 and 4.4. *supra*.
20. *Sundaracharlar* v. *Narayana Ayyar*, A.I.R. 1931 P.C. 36.
21. *United Bank of India* v. *Lakharam Sonaram & Co.*, A.I.R. 1965 S.C. 1591 at 1593.
22. Para 6.4. *supra*.

Slums in urban areas : legal aspects

Akhileshwar Pathak

SLUMS IN URBAN AREAS : LEGAL ASPECTS

I. INTRODUCTION

1.1. This study deals with legislation relating to slums in urban areas. The aspects of slums focused upon by such legislations. The deficiencies and the possibilities of amendment in such legislation.

1.2. The problem of slums is a human problem. This aspect is often overlooked, but it does manage periodically to come out and assert itself, through legal or extra-legal machinery. Incomplete realisation of the number of aspects of the problem, and insufficient awareness of the human element has, in the context of slums, created serious and unending difficulties, including difficulties with regard to the legislative framework on the subject.

1.3. Literature on slums in India is not very profuse, but it is not scanty, either. Much of it is contained in official or semi-official studies. Some of those studies have not been published, or, if published, have not received much publicity. However, there is a fairly recent and very helpful study by the Task Force on Housing and Urban Development constituted by the Planning Commission, being Paper No. IV (on Shelter etc. and Slum Improvement (September 1983). The present study has drawn, wherever necessary, on some of the materials presented in that Report, indebtedness to which is gratefully acknowledged.

1.4. In the following Chapters, it is proposed to deal, first, with the genesis and content of slum legislation ; to deal next with some obscurities, deficiencies and other aspects of the legislation and finally to offer some suggestions for future action.

II. HISTORY

2.1. The first exclusive slum legislation in India was passed by the Parliament in 1956, the Slum Areas (Improvement and Clearance) Act, 1956, applicable to the then Union Territories. While moving the Bill in the Rajya Sabha, the Minister for Home Affairs explained the problem of Delhi.

> ".....It had a fairly large population even before Delhi was given an honoured place as the capital of India. Since then, there has been a regular flow of people into Delhi, its population has swollen greately in years"[1] [2 lakhs].

He further added :

> "According to normal standards, the population in an acre should not exceed 200. In Delhi, it is, on an average, as much as 600. But in the slum areas, the number per acre in some of the Katras go upto about 2,500, with the result that an individual has even less than two square yards for himself .... In some of these slums, they have to shar accommodation also with animals like cows, buffaloes and horses ..... So we have had recourse to this measure."[2]

2.2. In contrast with the situation then prevailing, the slum population of Delhi has swollen upto 25 lakhs, i.e. the slum population has multiplied by 12 times in the past thirty years. What may have been adequate thirty years back is grossly inadequate today. And what may suffice today would definitely be deficient subsequently because if the phase of rapid urbanisation continues the slum population is bound to grow. Even at a low estimate, it is projected to be 62 millions at the turn of the century.

2.3. The inactivity of the States in dealing with the problem of slums appears to be mainly due to the shortage of financial resources, so that the principal financial initiative and assistance has to come from the Centre.

The first attempt at tackling the slum problem was in the shape of the Slum Clearance Programme. This involved demolition and redevelopment or replacement of unfit housing. This scheme of slum clearance and slum improvement was introduced by the Ministry of Works and Housing on the basis of 50% loan and 50% subsidy to the State Governments. There was a ceiling on the cost of the tenements built for re-housing. The programme of clearance was abandoned in favour of a new programme, which itself has gone through successive changes with the growing magnitude and complexity of the problem. However, during all these years of programme experimentation, the legislative framework has remained unmodified. Incidentally, the major reason for abandoning the programme of slum clearance and improvement was the shortage of resources for running the programme.

III. THE LEGISLATIVE FRAMEWORK

3.1. The present legislative framework on the subject of slums consists of one Central Act and several State Acts. The forerunner of all State Acts relating to slums is the Central Act on the subject— the Slums Clearance and Improvement Act, 1956. Increase in slum population and deterioration in the conditions of slum dwellers soon became an All India feature. It did evoke a legislative response in the States. But the State Acts mostly followed, with or without

1. *Rajya Sabha Debates*, col. 2974, 18 December, 1956.
2. *Rajya Sabha Debates*, col. 74-75, 18 December, 1956.

18—258 M. of Urban Dev./ND/88

modifications, the Central Act.[3] No effort seems to have been made by the States to go deeper into the matter and to squarely tackle the problem.

3.2. The Central Act (which will serve as the model for discussion) has the following substantive parts :—

(1) Definition of Slums ;

(2) Provisions for improvement ;

(3) Provisions for clearance and redevelopment ; and

(4) Provisions for acquisition of land.

Section 3 of the Act deals with declaration of slum areas. It reads—

"c. *Declaration of slum areas.*—(1) Where the competent authority upon report from any of its officers or other information in its possession, is satisfied as respects any area that the buildings in that area—

(a) are in any respect unfit for human habitation ; or

(b) are, by reason of dilapidation, overcrowding, faulty arrangement and design of such buildings, narrowness or faulty arrangement of streets, lack of ventilation, light or sanitation facilities, or any combination of these factors, detrimental to safety, health or morals ;

it may, by notification in the Official Gazette, declare such area to be a slum area.

(2) In determining whether a building is unfit for human habitation for the purposes of this Act, regard shall be had to its condition in respect of the following matters, that is to say—

(a) repair ;

(b) stability ;

(c) freedom from damp ;

(d) natural light and air ;

(e) water supply ;

(f) drainage and sanitary conveniences ;

(g) facilities for storage, preparation and cooking of food and for the disposal of waste water ;

and the building shall be deemed to be unfit as aforesaid if and only if it is so far defective in one or more of the said matters that it is "not reasonably suitable for occupation in that condition."

3.3. The Act does not concern itself with the legality of occupation. "The Act refers to the inadequacy of shelter in terms of its structural quality, hygienic condition and availability of services. It does not concern itself with legality or illegality."

3.4. The whole body of the Act reflects that the Act was intended only for the privately owned slums. At that time, squatting on public property was either non-existent or had not taken a serious proportion. Explaining the provisions of the Bill, the Hon ble Minister noted :[5]

> "This Bill will enable the Government to ask the owners of these slums to provide necessary amenities ; the cost will be realised from them. It also empowers Government to order them to repair these slums and take other measures that may be essential for the convenience of the dwellers of these slums. It also authorises Government to acquire slum areas, the land on which slums had been built and are standing today."

3.5. The Central Act empowers that Competent Authority (created by the Act) (i) to declare "Slum Areas" according to the appropriate provisions ; (ii) to declare "clearance area", if the most satisfactory method of dealing with the conditions in a slum area is the demolition of all buildings ; and (iii) to order an owner to make the dwelling habitable, if it is possible to be done at a reasonable expense, and if it is not then considered necessary, to demolish it. Be it demolition or improvement, the owner is ordered to carry it out, and if he fails to do, the Authority carries it out and recovers the cost. In the case of clearance, the Competent Authority re-develops the area, if it is satified that it is in public interest to do so or lets the land owner re-develop the land in accordance with plans approved by the Competent Authority and subject to such restrictions and conditions as the Authority may think fit to impose. If the owner fails to comply, the Competent Authority will proceed on its own, to do what it had asked to be done and recover the costs, with interest, from the owner.

IV. RESTORATION OF PREMISES

4.1. Acts relating to slums provide a number of measures for dealing with slums. These include one or more of the following :—

(a) clearance ;

(b) improvement ;

(c) eviction ;

(d) restoration of the premises (after improvement) to the original dweller ;

3. Various state enactments have been tabulated in Annexure.

4. See Task Force Report on *Housing and Urban Development, IV Shelter for the Urban Poor and Slum Improvement (Planning Commission)*, 44 (Sept. 1938).

5. *Lok Sabha Debates*, col. 4136, 20 December, 1956.

(e) compensation, consequential on eviction ;

(f) others.

4.2. Some of the Acts relating to slums make provisions for the restoration of occupancy to the previous slum dweller (after improvement or re-erection), but not all of them have such provisions. The Acts also provide for acquisition of land in a slum area for carrying out the objectives of the Acts. It may be mentioned that compensation under the Slum Act is different from the Land Acquisition Act.

4.3. The Central Act also provides for restoration of occupancy (sections 20-A, 20-B). This was introduced by an amendment in 1964. The Statement of Reasons reads :

> "**Clause 12**—Proposed Section 20-A seeks to impose, in the circumstances mentioned in that section, an obligation upon the owner of a building to replace a tenant, who has vacated the building to facilitate the execution of any works of improvement or re-erection of the building, after the completion of such works of improvement or re-erection of the building. Proposed Section 20-B provides for determination of rent of buildings in a slum area let out after the execution of any works of improvement or re-erection of the building. In the case of an old tenant replaced in possession of the building in pursuance of the provisions of proposed Section 20-A, a concessional rent is prescribed and in the case of other tenants the provisions of the general rent control law are sought to be made applicable."[6]

4.4. The competent authority can direct the slum owner to improve the dwellings or demolish it. The rents in slums are so low that the land-owners do not have the resources to invest. In any case, the return may not be very high. As to the slum dwellers, they may belong to the lowest economic strata and the revised rent is beyond their reach. Over a period of time, even the cheapest house built by public agencies becomes beyond the reach of the weaker sections of society.

4.5. If the work of improvement or re-erection is taken up, whether on the order of the competent authority or on the owner's initiative, the tenant will have to vacate the building. Occupancy can be restored to him only on a "revised rent". The revised rent would generally be too high for him and the rate of re-occupancy is, therefore, likely to be low.[7] A higher income group is likely to occupy the area, while the previous slum dweller is left to find a dwelling for himself.

4.6. Such a situation defeats the very object of the Act. The right strategy is to accommodate the same people in the same area, at least where congestion is not a problem. This is important, because, in slum areas, there is a close nexus between the location of the slum and the place of work of the people who live there. The Supreme Court noted in a recent case[8] that the authentic data compiled by agencies, official and non-official, no doubt reveal that pavement and slum dwellers close in/on a pavement or a slum in the vicinity of their place of work.

4.7. Thus, if one takes the example of Bombay, the poor cannot live in Central Bombay, because land is too expensive; they cannot live on the outskirts, because they cannot afford to commute. Squatter settlements and the pavements are the only alternatives.

4.8. The arithmetical position regarding "revised" rent will be apparent from the Tables given at the end of this Chapter.

TABLE 1

Table of Revised Rent (Improvement)

State/U.T. Previous rent	% of Improvement cost +	% of cost of acquisition, if any
Delhi	6%	6%
T. N.	6%	6%
Gujarat	6%	••
Mysore	6%	6%
Assam NO PROVISION		
U. P.		
Maharashtra Provision in case of re-erection only.		

6. Gazette of India, P. II, S.2 Extra p. 679-80 dt. 17-9-1963.
7. See also Para 7.2 *infra.*
8. *Olga Tellis* v. *Bombay Municipal Corporation,* AIR 1986, S.C. 180 at Table 2.

TABLE 2

Table of Revised Rent (Re-erection)

State/U. T. Previous Rent	% of re-erection cost +	% of cost of land acquisition, if any
Delhi	4%	4%
T. N.	4%	4%
Maharashtra	4%	4%
Mysore	4%	4%
Gujarat	4%	4%
Assam	4%	4%
Punjab	NO PROVISION FOR RESTORATION OF OCCUPANCY	
U. P.		
A. P.		

V. EVICTION

5.1. Where the Slums Act provides for eviction of the slum-dweller, a number of legal questions arise, such as—

(a) Who takes the decision to evict?

(b) What are the grounds on which eviction can be ordered?

(c) What guidelines, if any, are provided in the law or read into the law, before eviction?

Some of these questions have come up before the courts.

5.2. The Slums Act provided that no tenant can be evicted without the prior permission of the competent authority. But no guidelines for making the decisions were embodied. In *Jyoti Prasad* v. *U.T. of Delhi,*[9] the Supreme Court ruled :

> ". . . . Obviously, if the protection that is afforded is read in the context of the rest of the Act, it is clear that it is to enable the poor who have no other place to go to, and who, if they were compelled to go out, would necessarily create other slums in the process and live perhaps in less commodious, and more unhealthy surroundings than those from which they are evicted, to remain in their dwellings until provision is made for a better life for them elsewhere."[10]

The Supreme Court further noted :

> "The Act itself contemplates eviction in cases where, on the ground of the house being unfit for human habitation, it has to be demolished, either signly under s. 7 or as one of the blocks of buildings under Chapter IV. So long therefore as a building can, without great detriment to health or safety, permit accommodation, the policy of the enactment would seem to suggest that the slum dweller should not be evicted unless alternate accommodation could be obtained for him."[11]

5.3. These guidelines, read into the Act by the Supreme Court, were embodied in the Act through an amendment, by inserting section 19(4).

5.4. Section 19(4) came up before the Delhi High Court in *Punnu Ram* v. *Chiranji Lal Gupta*[12] and the court noted :

> "That on the enactment of S. 19(4), it cannot be said that the scheme of the Act or its objectives have been in any way changed from what was pronounced in **Jyoti Prasad's** case (A.I.R. 1961 S.C. 1602). In view, however, of the enactment of S. 10(4), the conditions for the exercise of the power by the competent authority were clearly defined."[13]

It was further said :

> "That the principal objective of the Act being clearance of slums and prevention of creations of slums, if, in a given case, the demolition or re-erection or re-construction of a building or a set of buildings was necessary in the interest of slum clearance or improvement the poverty of the tenant, even if established, would not debar the competent authority from granting permission."[14]

The Court clarified :

> "In plain language, it means that if the tenant is held to have means of acquiring alternative accommodation, permission must be granted. Alternatively, even if the tenant

9. *Jyoti Prasad* v. *U/T of Delhi*, A.I.R. 1961, S.C. 1602.
10. *Id. at* 1611.
11. *Ibid.*
12. *Punnu Ram.* v. *Chiranji Lal Gupta.* A.I.R. 1982 Delhi. 431.
13. *Id.* at 441.
14. *Ibid.*

does not have means to acquire alternative accommodation but his eviction is in the interest of improvement and clearance of slum areas, permission has to be granted. May be, in a given case, a poor tenant, if evicted creates another slum. Nonetheless, if it is in the interest of improvement and clearance of a slum area that he be avicted, then permission must be granted."[15]

The Court also pointed out that that it was not as if the state alone could act to attain the objective of the legislation but "an individual or a group of individuals owning property in slum areas can assist the State in attaining the objective of clearing and improving slums. Indeed, that is why the Parliament brought in the amendment to S. 19 and S. 19(4) was enacted."[16]

VI. THE ECONOMIC ASPECT

6.1. The slum problem has very important economic aspects. This sounds elementary—but non-realisation of the importance of this aspect has led in the past to deficiency in governmental approaches to the problem.

6.2. The rapid growth of slum population has been due to the migration of the rural poor to the urban centres in search of livelihood. This population is in the clutches of the market mechanism. No one builds for the poor, as they cannot pay the rent determined by the market. The city administration also has only a marginal policy for housing the low income groups, and none for the poor who cannot pay at all. Industrialists, traders and others who employ a large number of the migrants do not care for their welfare and do not pay their living wages (at any rate, not wages enough to afford proper housing). Thus, the poor are excluded from the category of those who can rent a house. The system forces them to squat or to live in temporary hutments without civic amenities. In this manner, the stage is set for the creation of a slum. The population pressure further congests the existing slums. Deterioration of buildings or living conditions due to the disrepair of buildings, non-maintenance of civic amenities and over-crowding can also result in slums, though such slums are not inhabited by the poor alone.

6.3. The phenomenon of slums is essentially one of economic deprivation—deprivation of finances required to pay the rent determined by the market. It is poverty which, in the first place, brings such a large population to migrate to the urban centres and in the second place forces them to form slums and be instrumental in accelerating the growth of slums.

6.4. No statistics are available specifically dealing with the incomes of individuals and families in slum areas on an all India basis. However, certain studies relating to urban income may be referred to. Thus, the National Sample Survey has indicated[17] that in India—

(a) 75 per cent of the urban population has income less than Rs. 350 per month, and

(b) 90 per cent of the urban population has income less than Rs. 600 per month.

6.5. Slums are low rent areas. According to the National Sample Survey,[18] the monthly rents in slum areas in 1976-77 were as under :—

(a) Rs. 15-21 in A class cities.

(b) Rs. 18-22 in B class cities.

(c) Rs. 17-92 in C class cities.[19]

6.6. Figures of income distribution are given in Table 3 at the end of this Chapter.

6.7. Position regarding compensation is given in another Table 4 also given at the end of this Chapter.

TABLE No. 3

Distribution of Household by Family Income

Income Range (monthly)	% of total population
Rs.	
0–50	0·7
51—100	5.9
101—200	49·8
201—300	27·9
301—400	9·2
401—600	4·4
Above 600	2·1

[*Source* : B. Bhaskar Rao, '*Housing and Habitat in Developing Country*, at 178].

15. *Id.* at 444.
16. *Id.* at 442.
17. S.S. Jha, Structure of Urban Poverty (Popular Prakashan, Bombay). p. 34 (1986).
18. Vol. 3(4) *Sarvekshana* April 1980 as cited in *supra* note 4 at 24.
19. A class cities—cities with a population of 1 lakh to 3 lakhs.
B class cities—cities with a population of 3 lakhs to 10 lakhs.
C class cities—cities with a population of exceeding 1 million.

Compensation under the Act is as under :—

TABLE 4

Compensation under Slum Acts. (Acquisition of land)

Sl. No.	State/U.T.	Multiple of net average monthly income actually derived from such land during the period of five consecutive years immediately preceding the date of publication of the acquisition notice.
1.	Delhi	60
2.	U. P.	100
3.	Maharashtra	60
4.	Andhra Pradesh	60
5.	M. P.	60 (If from Slum Area, otherwise according to the Land Acquisition Act).
6.	Tamil Nadu.	Market value

VII. CLEARANCE AND IMPROVEMENT

7.1. The initial emphasis of the policy regarding slums was on clearance—a feature prominently reflected in the Central Act on the subject.

7.2. The net result of the emphasis on clearance is that while the landlord is forced to improve the housing conditions, the tenants are also forced out of the premises.[20] Tenants from a higher income bracket are more likely to occupy the restored premises and the old tenants are left to care for themselves, thereby creating congestion at other places, usually resulting in the creation of slums or in squating.

7.3. Further, in the case of re-development, the competent authority is not necessarily bound to re-develop the area for residential purposes or, at any rate, for the benefit of the persons from the same income group. The authority can re-develop the area, keeping in view the overall growth and planning of the urban centre, its ecology and alternative uses. The "alternative" uses can be widening of streets, provision of civic amenities and the like—all being objectives which are not necessarily going to result in restoration of the displaced population, or even a substituted population in equal number at the old site. Moreover, even if re-development with an emphasis on residential re-settlement is undertaken by the above authority, the new constructions would not be adequate to support a slum population of the pre-existing density.

7.4. Because of the organised pressure from various elite groups, there is a continuing demand upon the local authorities to clear slums and squatters from the centres of cities so that more well-located land is made available for those who are better off. The typical response of a public authority is to re-locate the poor (if that is done at all) at the periphery of the city and often outside the urban limits as that is seen as the most expendable and cheapest land.

7.5. That the emphasis of the legislation is on clearance, is evident from a ruling of the Delhi High Court.[21] According to the ruling, the Slum Clearance Act operates, irrespective of the poverty of the dweller and irrespective of the possible social and economic consequences of the enforcement of the Act. The principal objective of the Act is clearance of slums. If, in a given case, demolition of a construction, or its re-construction or re-creation, is in the interest of slum clearance or improvement, then the poverty of the dweller, even if established, would not legally debar the competent authority from granting permission.

7.6. In due course, the clearance programme was abondoned. The Task Force note the reasons for the policy change. "A number of factors were responsible to bring about such a change in Government policy; these included (a) widespread resentment from the people against large scale demolition of established communities under the slum clearance programme, (b) large amount of funds needed for such a programme compared with the availability of limited resources; (c) fast deterioration of 'fit' structures; (d) the change in emphasis was expected to induce owners of slums to undertake renovation of their properties; and (e) it was expected that a large number of slum dwellers could be benefited within "the given resources, if improvement of slums was resorted to."[22]

20. Para 4.5 *supra.*

21. *Supra* note 12.

22. *Supra* note 4 at 43 para 3.2.

7.7. Subsequent policy reflects the following changes in the situation and the approach of the Government to the whole problem :

(a) Slum clearance is not a financially viable programme ; therefore it is to be dropped.

(b) Now, it is the slums on public land and not those on private land which form the major part of the problem and efforts need to be focussed on them.

(c) In the private slums, if the majority of dwellers live in dwellings, then the State will assist them ; and, if otherwise, (i.e. the slum-dwellers themselves live in non-slum areas), then the competent authority will order them to improve the dwellings under the 'Slum Improvement' part of the Acts.

In the context of clearance, the Supreme Court observed :

"... and, in that event, the dwellers would, of course, have to vacate, but it is presumed that alternative accommodation would necessarily have to be provided before any such order is made."[23]

7.8. With the introduction of the Scheme of Environment Improvement of Slums in 1972, the emphasis of Government efforts shifted in the direction of improvement of the environment of slums through the provision of certain minimum facilities like water taps and community facilities, storm water drains, sewers, latrines, paved roads/lanes and street lighting.

7.9. The guidelines for the scheme of Environment Improvement of Slums stipulate that improvements should be completed in slums located on public lands, before those on private lands can be considered. "Public lands" include lands owned by State Government, Central Government, railways, port trust, etc.

7.10. The changed approach reflects the following features :—

(a) The financial assistance will be geared to provide civic amenities to slums on public land.

(b) Financially, if possible, the same facilities will be rendered to private slums.

(c) Improvement of dwellings will not find a major role; however, it is not totally ruled out.

(d) Slum improvement of private slums will be carried on under the obligatory duty imposed on the competent authority.

7.11. The changed approach takes note of the changed reality. The changed reality since 1956 is that the slums on public land dominate in size, instead of the private slums. The population influx has been so sizeable and housing facilities for that income group so inadequate, that the existing slums on private land (areas of low rent) also could not accommodate them and they were forced to occupy public land. The changed approach exhibits these features : (a) clearance and redevelopment is financially and institutionally not viable ; (b) the problem is so gigantic that financially, it is not possible to do more than providing the basic minimums.

The overall conclusion is that the concept of slums is essentially a problem of poverty-- and, specially, poverty in relation to inadequate housing.

VIII. ADVERSE EFFECTS OF EVICTION

8.1. Ousting people from these slum areas is going to proliferate squatter settlements and it is not a solution.

8.2. The solution is in displacing a minimum number of people in the whole process. The following suggestions may be in order :—

(1) Acquisition of land in a slum area being used exclusively for renting, to create a favourable security of tenure for the tenants. This will call for an amendment of the Act because the acquisition provisions are only for effecting improvement and clearance.

(2) Reducing the costs of improvement and re-erection, by making the spacing rules and building bye-laws flexible for the slum areas, without compromising the safety part of it. Ceiling on construction cost and encouraging low cost housing can also prove fruitful.

IX. LEGALITY

9.1. It has been noticed[24] that Slum Acts do not concern themselves with the legality or otherwise of the occupancy of premises by the slum dwellers. At least, they make no direct reference to the aspect of legality.

9.2. The Slum Acts seem to deal with the whole problem as a physical entity, i.e. from the point of view of structure and environment, and not from the point of view of economic-legal relationships prevailing in the area. This explains their total silence on the issue of legality. The only exceptions are the special procedure for eviction and restoration of tenancy of slum-dwellers, provided in some State Acts.

9.3. Connected with this is another aspect of material and practical importance. The Acts were intended for private slums because squatting had not then become a problem. However, in subsequent years, it is slums on public land which form the bulk of the slum

23. *Supra* note 8 at 1611.

24. Para. 3.3. *supra*.

problem. In the Government's programme and policies, one can see the shift of emphasis towards slums on public lands. This emphasis has not found adequate reflection in the legislation.

9.4. Squatter settlements (settlements on public land) are inherently unauthorised and, to that extent, have no legal authority to exist. A squatter is a person who has taken possession of lands, a house, or a building and occupied it without lawful authority to do so. These settlements are mostly on public vacant land earmarked for public purposes. A number of State Governments have, by executive orders, decided a cut-off date. The settlements before the specified dates have been regularised, while the subsequent ones are expected to be demolished. When the Environment Improvement Scheme speaks of slums on public lands, it refers to these *regularised settlements*. This, incidentally, shows that the aspect of illegality does not find adequate reflection in the legislation.

9.5. The above comments are offered, not for mere academic interest, but from a practical angle. There is the most important question of housing the occupants. If proper facilities for the slum dwellers in other locations are not feasible, adequate investment in the premises by the slum dwellers should be encouraged. Legislation on slums at present does not take this aspect into account. In particular, the legislation is silent on the question of security of tenure, so that there is a perpetual environment of insecurity and vulnerability. This is not psychologically conducive to adequate investment. In the absence of security of tenure, the slum dweller will invest only that minimum sum which is needed for survival.

X. CONFLICTING LEGISLATION

10.1. A satisfactory solution to the problem of slums lies more in the region of economic and administrative measures rather than in the region of law. Nevertheless having regard to the scope of the present study, some observations with a legal angle may be offered.

10.2. It may, for example, be mentioned that some difficulties arise by reason of conflicting legislation on the same topic. Hutments on public lands offer an illustration of this anomaly. The Task Force had occasion to deal with this anomaly, in 1983.[25]

> "If the statutory provisions of the Master Plan are not to be violated, they (hutments) must be cleared, which is rarely possible. Alternatively, they can be improved as a temporary measure. The guidelines for slum improvement, however, suggest that the slums must not be earmarked for clearance at least ten years from the date of effecting improvements. This compromises the Master Plan. The third possibility is that when the Master Plan is revised there is statutory provision for revising the Master Plan (every ten years), the land use of the sites of hutments is changed from 'public purpose' to 'residential' to accommodate the existing slums.
>
> This would, in all probability, means less than adequate provision in the Master Plan, of public amenities for an area, such as schools, hospitals, which are primarily intended to be used by the poor. Such anomalies have their roots in the contradictions between the Town Planning Act (which provides the statutory basis for Master Plan/Development Plans) and Slum Areas Act."

XI. SUGGESTIONS

11.1. It is possible to make a few suggestions for remedying the deficiencies revealed by the preceding discussion, in so far as they can be dealt with by legislation. The following suggestions are offered :—

(1) Slums area on public land should be incorporated in the Slum Law. This will clear up the situation and authorise acquisition of land, if necessary.

(2) The regularised settlements should be given security of tenure, be it for specified period. This will remove the vulnerability felt at present and encourage the dwellers to improve their dwellings.

(3) If the tenure is a long term one or if there are allotments of plots, the laws relating to spacing, building materials etc. should be made flexible for these areas in order to reduce the cost of shelter without compromising essential safety.

(4) Civic amenities to these settlements be provided. (This is being done under Environment Improvement Scheme).

11.2. In the ultimate analysis, the question is of adequate housing and a permanent solution can be found only by planning to house the poor at convenient sites. This includes making land available to them; provision of civic amenities and institutional support to help them shelter themselves. Unfortunately, in our Town Planning, slums are nowhere in the picture in the whole process. This approach indirectly encourages the growth of slums. What is needed is a change in attitude to the whole problem and legislative and administrative backing, geared to housing the poor.

25. *Supra* n. 4.

11.3. The Task Force of the Planning Commission, after reviewing eight largescale slum clearance, improvement and resettlement projects, have made some points worth consideration. The various "shelters", it was observed, show significant change in the attitude towards the slum problem and a new strategy to housing the urban poor. These changes include :

(i) A major shift in attitude towards people (not an unproductive burden, but a productive resource).

(ii) A new interpretation of an approach to people's self-initiated housing actions and self-generated housing stock. (Even if deficient, approaches to a solution, not a problem. Not to be demolised, but to be conserved and improved).

(iii) A new definition of a "house" (not necessarily pucca or permanent, status symbol, but one that shelters adequately).

(iv) A re-definition of the housing task (not necessarily permanent building, but liveable environment).

(v) A new role for the traditional housing agencies. (not doers, but facilitators. Not builders, but promoters).

(vi) A new relationship between housing agencies and the clients. (Not donors and receivers, but partners).

(vii) A new enconomics. (Not charity, but investment).

(viii) A new definition in terms of scale. (Not a symbolic gesture, but full coverage).

(ix) For some, a new vision. (Not houses alone, but overall development).[26]

11.4. Positive steps are called for, not only because a welfare State takes these responsibilities on itself, or not merely because the urban centres are as much the areas of slum dwellers as of the others, but because of the hard reality that it is the slum dwellers, who are principal pillars of growth and affluence of the urban centres.

26. *Supra* n. 4 at 73 para 5.5.

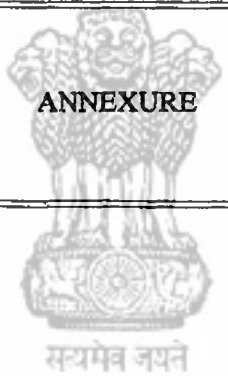
11.5. It should be emphasised that in the final analysis, legislation on slums is a measure fit only to remove slums, but not to provide rehabilitation of the displaced population. It tackles slums as physical entities, but does not go into the root cause that led to the slums. Its pre-occupation is with the slum areas, and not with the people who were residing in those aeras. A solution for eliminating slums is devised by the State, by passing the burden of doing it on the slum dwellers. The slum dwelling population, coming as it does from the lowest income strata, cannot afford to live in a better environment, because a better environment would be most costly. It cannot for example, pay improvement cost of 6% a year or re-erection cost at the rate of 4% a year. If the slum dwellers could have afforded to live in a better and more costly environment, they would not have come to live in slums, in the first place. If these basic economic factors are understood, it will become clear that the implementation of the Slum Acts, as they stand at present, is only going to render people shelterless and the question keeps reproducing itself. The economic necessity which produced the phenomenon of slums in the first place, causes the same phenomenon to be repeated. The only result is a locational change.

11.6. This is not to suggest that the clearance programmes be abandoned. The need is for building tenements to rehabilitate the persons ousted (to whatever extent the financial package permits). The Slum Acts unfortunately do not have any rehabilitation measures in-built in them. Some States have incorporated measures for rehabilitation in the rules under the Act, or given them legal status through other administrative measures. But it is not legally obligatory to provide alternate accommodation to the ousted slum dwellers. Again, the allotment rules give preference to the poorest of the poor and an element of subsidy in the rent, while the rest have to pay economic rents.

It is obvious that these aspects do not land themselves to improvements effected within the parameters of the existing policy framework.


सत्यमेव जयते

ANNEXURE




सत्यमेव जयते

PROJECT STATEMENT

1.1. The Indian Law Institute examined at a national Seminar Urbanization and Law in 1967. Its Journal has carried major articles on law and urbanization (e.g. Atul Setalvad, A Study into Certain Aspects of the Land Acquisition Act, 1894 in 13 Journal of the Indian Law Institute (J.I.L.I.) 1-69 (1971) and B. N. Mukerjee & David L. Willcox, A Constitutional Balance : The Needs of Government Planning V. the "When" of Procedural Reasonableness—a Draftsmen's Task, 9 J.I.L.I. 275 (1967).

1.2. The studies so far reflected in the Indian Law Institute's activities reveal that most problems of judicial interpretation arise out of the ways in which legislations are drafted and ways in which discretionary powers under the various laws are exercised by various administrators. Judicially enunciated norms are not adequately cognized by planners, policy-makers and administrators.

1.3. It is, of course, true that resourceful people have challenged and checkmated vigorous pursuit of urbanization policies and programmes by stay orders and manipulation of delays built into the judicial system. The poor management of judicial institutions which allow them to be interim resources for the deferral of implementation of basic urbanization policies is a prbolem which will persist, unless substantial judicial reforms, now assigned to the Tenth Law Commission of India, are realized.

1.4. We believe that it is important for the Urbanization Commission to have scientific inputs in four specific domains : viability of legislative design in terms of its constitutionality, the structuring and exercise of discretionary powers under various urbanization laws, judicial understanding of and attitudes to urbanization policies and programmes and finally the need for institutional renovation of the judiciary in so far as the effective and equitable handling of these policies and programmes is concerned.

1.5. The manner in which policies are translated into legislations is crucial to the success of implementation. The proposed study will identify the range of problems created by 'colonial' methods of legislative drafting, the inability of the draftsmen to fully grasp the policy which she is called upon to render into law, and alternate methods of drafting which will overcome these and related problems.

1.6. Urbanisation can and has been viewed as a process of social change. And as any process of social change it disturbs settled interests and creates fresh ones. This process also unleashes friction between the divested and the vested groups. This friction gives rise to disputes/controversies which get filtered into various forums for resolution. One major forum of dispute resolution is the judiciary. It is of interest to study how these disputes get filtered into the judicial system and to examine the attitudes adopted by the legal profession and the judges whilst tackling these disputes.

1.7. The apex Court has handled disputes resulting from the process of urbanisation in two major contexts : (i) Acquisition context; (ii) Civic Rights context.

1.8. In the first context, the propertised classes moved the Court against the State which had in its socialist welfare role acquired properties in order to launch activities aimed at furthering public interest. In this group of cases the settled interests/divested groups took recourse to the judicial process in order to resist the process of urbanisation. This part of the project will examine the nature of the vested interests resisting the urbanisation process ? What kind of legal arguments are articulated by them to press their claims ? How are these arguments controverted by the State ? What is the slant of the State's arguments (i.e. whether it relies on the mandate of the directive principles) ? And lastly how does the Supreme Court react to the arguments put forth before it and what is the attitude taken by it towards urbanisation in this group of cases ?

1.9. In the second context, it is the groups in whom urbanisation has vested benefits, interests and rights are the initiators of the judicial process in order to seek enforcement of these rights. These groups approach the Court to enjoin the State to fulfil the positive mandates of urbainsation e.g. to provide sanitary facilities and to undertake the process of urbanisation according to its constitutional directives for e.g. to provide alternate accommodation to slum dwellers.

1.10. The project will examine how the benefits claimed by these groups get articulated into legal issues ? Which groups are the agitators of such interests ? Does the State take an adversarial approach when hauled as respondent or does it accept its obligations and plead scarcity of resources ? Does the Court's approach differ in the two contexts ?

1.11. The project shall help in deriving strategies to handle issues litigiously raised in the urbanisation context. Further examination of the judicial handling of urbanisation should yield insights on what went wrong in the process of urbanisation and techniques to obviate these difficulties can be devised.

1.12. The project will also examine the manner in which vast administrative discretion is structured under the different urban laws and how the courts have tried to maintain a strict scrutiny over the exercise of discretionary powers. The existing decisional law reveals that the courts have done this under the following heads :

(a) *malafide* exercise of power.

(b) exercise of power for *improper* purposes.

(c) exercise of power on *irrelevant* considerations;

(d) exercise of power to be reasonable, non-discriminatory and non-arbitrary;

(e) exercise of power by wielders of power independently without being dictated to, not mechanically and with due care and proper application of mind.

1.13. Apart from the negation of arbitrariness in administrative processes, the judicial insistence on the principles of natural justice or the concept of fairness leads to not just the balancing of administrative efficiency and fairness but to integrating the value of efficiency into the value of fairness. This is necessary to evolve an administrative ethos more responsive to people's rights. On the other hand, the present crisis of judicial institutions helps us pursue these goals only normatively, since decisions enunciating the norms take a very long time to develop.

1.14. A study of the class of people who have been challenging the arbitrary exercise of administrative power under the various urban laws. Have the marginalised, downtrodden and deprived populace of India had access to courts to prevent and correct excesses of administrative power under these laws ? If they do not have such access, then there is serious infirmity in the effective reach of administrative law to such groups, resulting in perpetuation of arbitrary exercise of administrative powers. The study will explore the legislative, administrative and judicial responses, and alternatives to these, in pursuit of a just urbanization policy.

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